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The Supreme Court of the United States has, in the case of Smith v. Townsend, affirmed the ruling of the Supreme Court of Oklahoma as to the validity of an entry of land made by a "sooner" who was at the time of the opening legally within the reservation. The Act of Congress opening to settlement the Creek Indian reservation in Oklahoma contained a provision that "any person who may enter upon any part of said lands, prior to the time that the same are opened to settlement, shall not be permitted to occupy or to make entry of such lands or lay any claim thereto." Smith, a railroad employee, who lived within the reservation at the time the lands were opened, entered a quarter section. His right of entry was contested by one Townsend, and decided in his favor by the local land officer, but on appeal the Commissioner of the Land Office, the District Court and Supreme Court of Oklahoma successively affirmed Townsend's entry. This ruling is now affirmed in an opinion by Mr. Justice Brewer, who concludes that "any one who was within the territorial limits at the hour of noon on April 22 was, within both the letter and spirit of the statute, disqualified to take a homestead therein."

The dry legal phraseolgy of a brief is seldom enlivened by wit or humor. But we have received from a member of the St. Paul, Minn., bar a copy of a brief which is somewhat out of the ordinary run of such documents, and which stamps its author as a man of no mean attainments as a humorist. The case for which the brief was prepared—McMurran v. Meek, before the Supreme Court of Minnesota, was one wherein a defendant (appellant here) sought relief from a judgment obtained against him through the negligence of his attorney below. After showing to the court the legal grounds for setting aside the judgment, and calling attention to the gross neglect of the former attorney, whereby "appellant was driven from the temple and has never had his day in, nor the ear of the court," our humorous brother, who, in his zeal for his client, forgets his loyalty to the profession, says, by way of answer to the suggestion, that appellant can recoup his loss by an action at law against the negligent attorney, that "the remedy is more constructive than real, and the suggestion is as absurd as would be the attempt to open a Jack-pot with prayer. The inability of an attorney to respond to a *fi. fa.* ought to be conclusively presumed, and we do not believe that a body of practical judges sitting as a court of good conscience will remit the innocent and diligent suitor to a remedy so robustly doubtful?"

The case of Birdwell v. State (Tex.), is an authority for the proposition that bad spelling does not vitiate a verdict, at least in Texas. The verdict of the jury in that case was as follows: "We, the jury, find the defendant guilty of the theift and assess his punishment at six years in the penitenture." The learned counsel for the prisoner took exception to the rendition of judgment upon this verdict, arguing that there was no such crime as "theift" known to the law and no such prison as the "penitenture." But the court overruled the exception and sustained the verdict, saying that "it is evident that the jury paid but little attention to their manner of spelling while composing the language in which they saw proper to couch their verdict, and while a critic might hesitate to approve of it as a model of composition, perfect in construction and spelling, still the jury succeeded in so framing it as to clearly indicate and convey their meaning."

The recent English case of Green v. Green, decided by Mr. Justice Barnes, raises a very remarkable point of private international law, of interest to practitioners in this country. A woman who is an American citizen marries an Englishman in London in 1890, and leaves him three months after marriage to visit her sick mother in Pennsylvania. Under the provisions of a statute of that State, of date June, 1891, she obtains a divorce against him. This statute confers jurisdiction in divorce in cases where a former citizen of a State, having married a citizen of another State,

American or foreign, is compelled by cruelty or other misbehavior of her husband to leave him. Mr. Justice Barnes held that the American court unjustly held the charge of cruelty established and (whether as a consequence, or independently, does not appear) had no jurisdiction. The judge further held that the wife's re-marriage in America, although valid there, is invalid in England, and granted the husband a divorce on account of the bigamy and adultery of his wife.

NOTES OF RECENT DECISIONS.

EFFECT OF RECITALS UPON RAILROAD AID BONDS ISSUED UNDER THE STATUTES OF ILLINOIS AND THE RATE OF INTEREST AND WHERE PAYABLE.—The United States Supreme Court, April 24, 1893, through Justice Brewer, rendered a decision which is of great importance to holders of Illinois railroad aid bonds. The case was the City of Cairo, Ill., v. Joseph Zane, and involved the validity of the bonds of that city issued to the Cairo & Vincennes Railroad Company. The vote for the issue of the bonds and the subscription to the stock of the railroad company was held before the prohibitory amendment to the constitution of 1870 went into effect, July 2, 1870, and the bonds were issued after that date to-wit: July 1, 1872. The decision is important, as under present statutes and rulings of the courts, but few more municipal bond cases will be determined by that august tribunal. This class of cases being generally determined by the United States Circuit Court of Appeals, the most interesting questions decided are the effects of recitals made under circumstances above stated on the bonds by corporate officials whose duty it was to determine the facts recited. The Supreme Court of Illinois as held, that where the vote to subscribe for stock and issue bonds in aid of railroads was had before the prohibitory amendment to the constitution of 1870 became effective and the bonds were issued after that time (to-wit: July 2, 1870), the burden of proof was on the bondholder to show not only authority of law for the issue of his bonds; but also that all conditions precedent to their issue as expressed in the vote were literally complied with irrespective of any and all recitals on the bonds. Jackson Co. v. Brush, 77 Ill. 59; People v. Jackson Co., 92 Ill. 59; People v. Town of Bishop, 111 Ill. 124; Town of Prairie v. Loyd, 97 Ill. 179; Eddy v. The People, 127 Ill. 428. The United States Supreme Court have held that where there was existing authority of law for the vote, and the subscription and the vote was had before the prohibitory amendment went into effect, then the recitals upon the bonds made by officials of the municipal corporation, issuing them, whose duty it was to determine the facts recited, estopped the municipal corporation from denying such recitals in a contest between the corporation and a *bona fide* holder of such bonds. Brooklyn v. Insurance Co., 99 U. S. 362; Insurance v. Bruce, 105 U. S. 328; County of Moultrie v. Savings Bank, 92 U. S. 637; Fairfield v. Gallatin Co., 100 U. S. 51; Oregon v. Jennings, 119 U. S. 74; Pana v. Bowler, 107 U. S. 520, 539; Harter v. Kernoclean, 103 U. S. 562; Wade v. Walnut, 103 U. S. 683; County of Clancy v. Society for Savings, 104 U. S. 586; Warren Co. v. Marcy, 92 U. S. 96. On this question Justice Brewer says: "But, further, the bonds on their face show that they were issued in payment of stock in the railroad company, and recite that they were issued in pursuance of an ordinance of the city council, and authorized by a vote of the citizens, and in accordance with the laws of the State; and they were duly registered by the auditor of the State, and his certificate of registry was endorsed on the back. It is also true that the recitals do not show when the ordinance was passed, or the election held, and do not refer by title or otherwise to the particular statute granting the authority, and the bonds were dated and issued after the constitution of 1870 had come into force. It is true that the certificate of registry is not conclusive that the bonds were issued in full compliance with the terms and conditions of a subscription. German Bank v. Franklin County, 128 U. S. 526-540. But surely these recitals and this certificate have significance. It is unneccessary to affirm that the certificates are so 'clear and unambiguous' (School District v. Stone, 106 U. S. 183, 187), as to estop the city from showing that the bonds were issued in violation, or without authority of law, or that they, in conjunction with the certificate, foreclose all possible defenses.

But when the law of the State provides for registry of municipal bonds and a certificate thereof, such certificate should be held sufficient evidence to a purchaser of the existence of those facts upon which alone bonds can be registered. If the plaintiff in this case, not resting upon the mere terms of the certificate, had examined the records of the auditor's office, he would have found there the certificate under oath, of the mayor of the city, of the election, its date, and facts necessary to warrant the issue of the bonds, such officer being the one named in the statute as the one to furnish to the auditor the evidences necessary to justify the registry. Can it be that a purchaser, with this evidence before him, is not protected by the statement upon the face of the bonds that they were issued in payment of a subscription? Is it his duty to examine all the proceedings, to see whether that which was a subscription in the first instance was called a subscription all the way through, and named as a subscription in the bonds, had not been transformed by some action of the city council into a donation? It will be borne in mind that it is not a matter of law, but of fact, in respect to which an estoppel is urged against the city by virtue of the recitals and the fact of registry. But it is unnecessary to pursue this line of thought further. We are of the opinion that the bonds were properly held valid in the hands of a *bona fide* holder."

On the other question of the rate of interest coupons would draw, and where payable under the laws of Illinois, Justice Brewer, continuing, said: "It is finally objected that the court erred in allowing interest on the coupons. They were made payable in New York, and as such drew interest according to the laws of New York. Pana v. Bowler, 107 N. S. 529, 546; Walnut v. Wade, 103 U. S. 683, 696. Counsel not questioning the fact that such have been the frequent rulings, insists that in this case, as found by the court, the bonds were issued under the law of 1849. That that does not authorize specificially the issue of bonds payable outside of the State; that in People v. Tazewell County, 26 Ills. 147, it was decided that "counties and municipal corporations, unless specially authorized by the legislative enactment, have no power to make their indebtedness payable at any other place than at their treasury," a decision reaffirmed in Johnson v. County of Stark, 24 Ill. 75-91, and adhered to in Sherlock v. Winnetka, 68 Ill. 630. We do not understand the findings of the court in the manner claimed. The finding is simply that the bonds are of the denomination of $1,000 each, as authorized under and by the laws of 1849, and not of the denomination of $500 each, as required by the charter of the railroad company. But there is nothing in the nature of things preventing the city from exercising all the powers conferred by two or more acts, where the acts do not, in and of themselves involve substantial contradictions. It is not a vital matter whether the bonds should be $500 or $1,000 each; and as the charter of the railroad company expressly authorized the issue of bonds payable in the city of New York, we see no reason why such stipulation could not be incorporated into a bond of the denomination of $1,000, and the certificate of the mayor to the auditor is that the bonds were issued under the authority of both acts. Knox County v. National Bank, 147 U. S. 91. Indeed, counsel refers to the law of 1857 (Public laws of Illinois, 18J7, p. 38), which provides that, "where any contract or loan shall be made in this State * * * it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other State, or Territory of the United States." If that statute is applicable, then of course it is immaterial whether the bonds were issued under the general railroad law or the act incorporating the railroad company. But it is unnecessary to consider this question at length. The settled rule in Illinois is that coupons draw interest after maturity. Harper v. Ely, 70 Ill. 581, 586; Humphreys v. Morton, 100 Ill. 592; Drury v. Wolfe, 134 Ill. 294, 297; U. S. Mortgage Co. v. Sperry, 138 U. S. 313, 340."

Other questions were decided in the opinion of Justice Brewer, but the question of the effect of recitals upon the bonds under the circumstances given, and that of intent, and where paid upon coupons after maturity under the laws of Illinois was the most important. The judgment of the court below was affirmed.

CORPORATIONS—PAYMENT OF SERVICES OF PROMOTERS IN STOCK.—Those who have acquired the stock of corporations in payment

for services rendered as promoters will be interested in the decision by the Supreme Court of New York of Herbert v. Uhl, commented upon in a recent issue of the *National Corporation Reporter*. That was a suit by the creditor of an insolvent corporation against one of its stockholders. The plaintiff proved at the trial that he had recovered judgment against the corporation upon which execution had issued and been returned unsatisfied and it was admitted that the defendant was a stockholder in the company. The evidence also showed that defendant's stock, which was one-fifth of the entire capital, had been issued to him for services in organizing the company and that he had paid no money for it. On this showing the trial court, nonsuited the plaintiff, but the supreme court decided on the appeal that this was error, and that the case should have been submitted to the jury upon the question of the good faith and fairness of the issue of stock to defendant.

In its opinion in that case the court said: "We think that the plaintiffs had established, when the evidence closed, a *prima facie* case, which called upon the defendant for the answer, if answer he had, to the plaintiffs' claim under the statute. While it is true that stock may be issued in payment for services rendered to the company (see Veeder v. Mudgett, 95 N. Y. 295), if the evidence shows that the amount of stock issued for such alleged services is grossly in excess of the fair value thereof, the plaintiff had at least the right to go to the jury upon the question whether such services were actually rendered, whether they were fairly worth the amount of stock issued in alleged payment thereof, or whether the issuance of stock for alleged services was not in fact an evasion of the statute. The evidence in this case shows that 20,000 shares of the stock of the company were issued to defendant for general promotion and other things, and that he never paid a cent for it. It may well be claimed that, even under the decisions relied upon by the defendant's counsel, services in the promotion of a company are not such as the company is authorized to pay for by the issuance of stock. But whether that be so or not, the issuance of one-fifth of the whole capital stock to defendant for the promotion of the incorporation of the company strikes us as being so excessive as to have at least rendered it incumbent upon the court to submit the *bona fides* of the transaction to the consideration and determination of the jury."

DIVIDENDS.

§ 1. *Nature of a Dividend.*—In order to get a clear idea of the nature of a dividend, it is necessary to attend to a number of distinctions which are often lost sight of or confused. In the first place, the declaration of a common dividend pertains to the administration of the business affairs of the corporation, and consequently it is a matter committed to the discretion of the directors, unless the governing statute, the articles of association, or other governing instrument, lodges it with the body of the shareholders or with some other body.[1] In the second place, the declaration of a dividend on what is called preferred stock rests partly in the discretion of the directors and partly in the terms of the contract consisting of the scheme of preference under which the shares are issued.[2] In the third place, the payment of a dividend, or, more strictly, of interest on what is called interest-bearing stock, or guaranteed stock, rests entirely in contract; and when the time for the payment of such interest accrues, the directors have no discretion to refuse it, any more than they have to refuse the payment of any other debt when it matures.[3] But these statements in regard to dividends upon preferred stock and interest-bearing stock must be qualified by the further statement that each particular case yields to the terms of the contract creating the preference. Further distinctions will appear when it is stated that, although in respect of ordinary dividends the directors have full discretion to determine when such dividends shall be declared, in the absence of restraint imposed by some governing instrument, and subject to the qualification hereafter stated, that they must exercise their discretion in good faith

[1] King v. Patterson, etc. R. Co., 29 N. J. L. 82; Ely v. Sprague, 1 Clarke Ch. (N. Y.) 351; Railroad Co. v. United States, 99 U. S. 420; Park v. Locomotive Works, 40 N. J. Eq. 114, 3 Atl. Rep. 162; Minot v. Paine, 99 Mass. 101; Stringe's Case, L. R. 4 Ch. 490; Williams v. Telegraph Co., 93 N. Y. 187; Excelsior, etc. Co. v. Pierce, 27 Pac. Rep. 44.

[2] 2 Thomp. Corp. § 2262, *et seq.*

[3] See, for example, Burt v. Rattle, 31 Ohio St. 116.

and not abuse it—yet no right to a preferred dividend can be created by the act of the directors, unless power to create such preference is expressly lodged with them by the charter or by some other governing instrument. In other words, the issuing of shares which in the drawing of dividends have a preference over the ordinary shares, is an act which creates such a constituent change in the character of the company that the doing of it lies outside of the ordinary business administration of the company which is committed to the directors. The general rule, then, is, that preference shares cannot be issued except by the unanimous consent of the stockholders, unless the governing statute provides for such an issue without such unanimous consent. In the fourth place, it is not competent for the corporation, even in its constituent character—that is to say, at a general meeting of all its stockholders, to issue interest-bearing shares, or shares the interest upon which is guaranteed, unless the governing statute authorizes it so to do.[4]

§ 2. *Declaration of a Dividend on Common Shares Discretionary with Directors.*—Unless the discretion of the directors already spoken of is overruled or controlled by the members, or is taken away from them by or under some valid governing instrument, the propriety of declaring a dividend on common shares in any given case rests in their discretion. Unless this discretion is so overruled or controlled, they have authority to declare dividends and to fix the time and place of payment, within such limitations as reason and good faith to the stockholder may require.[5] This discretion will not be controlled in equity by compelling the directors to declare and pay a dividend on common shares, unless it is made to appear that in refusing to do so they act capriciously and fraudulently.[6] When it is clearly made to appear that the directors are so acting in refusing to declare and pay a dividend, equity has the undoubted power to compel them to do so at the suit of a minority of the shareholders.[7]

§ 3. *Nature of a Dividend, when Declared.*—Shareholders are not co-owners of the corporate property in the sense in which joint tenants, tenants in common, or partners are co-owners; but the title rests exclusively in the legal entity called the corporation.[8] They cannot convey the corporate property, though all should join in the deed, so as to pass the legal title.[9] Accrued profits, being a property of the corporation, like its other property, and not the property of its shareholders, no shareholder has any proprietary right in any accrued profits, such as a partner or tenant in common might have. The rule, therefore, is that a dividend is not a debt of the corporation until it is declared.[10] But when it is declared, and when the time has arrived at which, by the resolution declaring it, it is payable, then, in one theory, there is a segregation of property between the corporation and each individual shareholder, so that the portion of each individual shareholder ceases to be the property of the corporation and becomes the property of the shareholder.[11] From that time, according to one theory, a debt is created by the corporation in favor of each individual shareholder to the extent of his dividend; and according to another theory, a trust fund is set apart by the corporation to his use, which the corporation holds as bailee

[4] Pittsburgh, etc. R. Co. v. Allegheny County, 63 Pa. St. 125; Painesville, etc. R. Co. v. King, 17 Ohio St. 534; Ohio College v. Rosenthal, 45 Ohio St. 183, 12 N. E. Rep. 665; *Re* Sharpe (1892), 1 Ch. 154; 2 Thomp. Corp. §§ 1536, 1576.

[5] King v. Patterson, etc. R. Co., 29 N. J. L. 82; Ely v. Sprague, 1 Clarke Ch. (N. Y.) 351; Railroad Co. v. United States, 99 U. S. 420; Park v. Locomotive Works, 40 N. J. Eq. 114, 3 Atl. Rep. 162; Minot v. Paine, 99 Mass. 101; Stringe's Case, L. R. 4 Ch. 490; Williams v. Telegraph Co., 93 N. Y. 187; Excelsior, etc. Co. v. Pierce, 27 Pac. Rep. 44.

[6] Karnes v. Rochester, etc. R. Co., 4 Abb. Pr. (N. Y.) (N. S.) 107; Hunter v. Roberts, etc. Co., 83 Mich. 63, 47 N. W. Rep. 131; Am. & Eng. Corp. Cas. 349; 9 Rail & Corp. L. J. 90; McNab v. McNab, etc. Mfg. Co., 41 N. Y. St. Rep. 909, 16 N. Y. Supp. 448. Compare Attorney-General v. State Bank, 1 Dev. & Batt. Eq. (N. C.) 545.

[7] Fougueray v. Cord (N. J. Eq.) 24 Atl. Rep. 499.

[8] Mickles v. Rochester City Bank, 11 Paige (N. Y.), 118, 42 Am. Dec. 103; Spurlock v. Missouri Pacific R. Co., 90 Mo. 200, 207; Williamson v. Smoot, 7 Mart. (La.) 31.

[9] Wheelock v. Moulton, 15 Vt. 519; Myers v. Perigal, 2 De Gex M. & G. 599 (approved in Edwards v. Hall, 6 De Gex M. & G. 74, 92).

[10] Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; *Re* London India Rubber Co., L. R. 5 Eq. 525; Stevens v. South Devon R. Co., 9 Hare, 312; Henry v. Great Northern R. Co., 1 De Gex & J. 605, 3 Jur. (N. S.) 1133; Taft v. Hartford, etc. R. Co., 8 R. I. 310, 5 Am. Rep. 575.

[11] Wheeler v. Northwestern Sleigh Co., 39 Fed. Rep. 347; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; citing *Re* London India Rubber Co., L. R. 5 Eq. 525. To the same effect see Stevens v. South Devon R. Co., 9 Hare, 312; Henry v. Great Northern R. Co., 1 De Gex & J. 605, 3 Jur. (N. S.) 1133; Taft v. Hartford, etc. R. Co., 8 R. I. 310, 5 Am. Rep. 575.

or trustee. Two results flow from these different conceptions. If a mere debt is created, due by the corporation to the shareholder, then it logically follows that he may maintain an action at law to recover it, if the corporation refuses to pay it, and some courts have so held.[12] Moreover, if it is a mere debt due by the corporation to the shareholder, and the shareholder at the same time is indebted to the corporation, then the corporation must be allowed to have a right of set-off in respect of it, that is to say, a right of retainer as against the shareholder.[13] But if the shares have been assigned, although not on the books of the company, prior to the declaration of the dividend, of which assignment the corporation has knowledge, it has no such right of set-off against the assignee for want of mutality of indebtedness;[14] and, for reasons already stated, where no dividend has been declared, and the shareholder is indebted to the corporation in respect of his shares, he cannot refuse to pay such debt because the directors have not declared a dividend.[15] On the other hand, regarding the segregated dividend as a trust fund or a bailment, the consequence follows that no action will lie against the corporation to recover it until payment of it has been demanded and refused, and the same consequence follows where it is regarded as a debt, but nevertheless payable only on demand. Hence, until such demand and refusal the statute of limitations or prescription will not run in favor of the corporation and against the shareholder's right of action for the dividend, for the want of an adverse holding by the corporation. And it is perhaps on the theory that the segregated dividend has become a trust fund in the hands of the corporation or its directors that equity assumes jurisdiction of actions by shareholders to compel its payment.[16] Under either theory of the nature of a dividend, when declared—assuming, of course, that it has been lawfully declared, in other words, that it is not what is sometimes called an *ultra vires* dividend, the corporation has no power to reclaim it from the shareholder, even before payment, except in the exercise of the right of set-off, already stated, or, in the case of a banking corporation, by the exercise of the banker's right of lien, the theory of which right is that dividends in the hands of a banking corporation remained pledged for the payment of any just debt due to it from the stockholder.[17] Dividends thus lawfully declared cannot be forfeited by the corporation by a declaration so to forfeit them, unless they are claimed within a stated period, because the law does not allow one man, on such a ground, to confiscate the property of another.[18] They cannot be appropriated by the State if not claimed within a stated period and turned over to a charitable institution, for the obvious reason that the legislature has no power, under American constitutions, to take the property of one man and give it to another, without just compensation, and not, then, except in furtherance of a public use;[19] though the legislature may, it has been held, vest unclaimed dividends in the trustees of a State institution to hold them in the character of trustees, since this does not destroy the trust but merely changes the trust fund from one agency to another.[20] Neither has the corporation any power to reclaim or recall a dividend which has been lawfully declared—as, for instance, by passing a resolution that the amount of the dividend standing credited to each shareholder shall be taken from his account and credited to an account known as the surplus fund.[21] Where power to declare the dividend exists, but it is improvidently declared, there is very doubtful authority to the effect that it may be reclaimed by the corporation, even where it has been paid to

[12] Képpel v. Petersburg R. Co., Chase Dec. (U. S.) 167; Beers v. Bridgeport Springs Co., 42 Conn. 17.

[13] See *Ex parte* Winsor, 3 Story (U. S.), 411, 421, which seems to decide this question both ways. See also Gemmell v. Davis (Md.), 23 Atl. Rep. 1032.

[14] *Ibid.*

[15] Ely v. Sprague, 1 Clarke, Ch. (N. Y.) 351.

[16] Armant v. New Orleans, etc. R. Co., 41 La. Ann. 1020, 7 South. Rep. 35; St. Romes v. Levee Steam Cotton Press, 20 La. Ann. 381; Philadelphia, etc. R. Co. v. Cowell, 28 Pa. St. 329, 339, 70 Am. Dec. 128; State v. Baltimore, etc. R. Co., 6 Gill (Md.), 363, 387; Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. Rep. 168. See also Keppel v. Petersburg R. Co., Chase Dec. (U. S.) 167, 213, where it is held that dividends being payab on demand, interest can only be allowed from that date.

[17] Bates v. New York Ins. Co. 3 Johns. Cas. (N. Y.) 238; Sargent v. Franklin Ins. Co., 8 Pick. Mass. 90; Hager v. Union Nat. Bank, 63 Me. 509, 512.

[18] Armant v. New Orleans, etc. R. Co., 41 La. Ann. 1020, 7 South. Rep. 35.

[19] University v. North Carolina R. Co., 76 N. C. 103, 22 Am. Rep. 671. See as to the constitutional principle: Wilkinson v. Leland, 2 Pet. (U. S.) 657; Loan Asso. v. Topeka, 20 Wall. (U. S.) 655.

[20] University v. Maltsby, 8 Ired. Eq. (N. C.) 257.

[21] Beers v. Bridgeport Spring Co., 42 Conn. 17.

the stockholder, on the theory of money paid under a mutual mistake.[22] But where a dividend has been declared under circumstances where the directors have no power to declare it, beyond question the corporation or its representative may successfully resist its recovery by the shareholder,[23] or may even reclaim it from him after it has been paid. For instance, the directors have no power to declare and pay dividends when the corporation is in such circumstances that to do so will be to diminish its capital stock to the prejudice of its creditors. The obvious reason is that the capital stock of a corporation being a trust fund for its creditors, it is not competent for the directors to distribute it, or any part of it, among the shareholders, leaving the creditors unsatisfied. This principle is enforced by statutes in nearly all the States prohibiting the declaration and payment of dividends under penal sanctions where the corporation is insolvent. If such a dividend is declared and paid and the corporation subsequently becomes insolvent, the dividend may be reclaimed, by its representative, for the benefit of its creditors.[24]

§ 4. *Validity and Propriety of Dividends.*—The principle just stated, enforced by so many American statutes, that dividends (with the exception of dividends in liquidation), can only be declared and paid out of profits, and cannot be declared and paid out of capital, has given rise to a variety of judicial decisions upon the question what is to be deemed profits as distinguished from capital, and, generally, under what circumstances a dividend may not lawfully be declared. A few of the more important of these decisions will be stated here. It has been held that a savings bank, organized under a statute which authorizes it to pay dividends from "surplus profits," may not declare and pay dividends based on accrued interest, not actually collected, however certain it may be that such interest will be paid.[25] So, payment of interest to shareholders on their shares being *ultra vires*, unless specially authorized by charter or statute,[26] such payment of interest, where there are no profits, is *ultra vires*, notwithstanding a provision of the charter that interest shall be paid until otherwise determined by the directors, but that no dividend or bonus shall be paid except out of profits.[27] But this principle has been held not to apply in a case where from the very nature of things, the plant of the corporation is subject to a steady waste and depreciation, as, for instance, a mine or a patent. In such a case, the law does not impose on the directors the obligation of keeping the value of the tangible assets equal to the nominal amount of the capital, and in such a case the payment of a dividend is not regarded as a payment out of capital.[28] The following rule for ascertaining what are profits of a railway company to be divided was given by Lord Romily, M. R.: "All debts of the company are first payable other than those which, for want of a better expression, may be called funded debts; for instance, if the defendants have raised money by mortgage, under the powers contained in their act, for the purpose of completing their line, this does not constitute such a debt as can be paid out of the profits before the profits are divided. But, on the other hand, any debts which have been incurred, and which are due from the directors of the corporation, either for steam engines, for rails, for completing stations, or the like, which ought to have been and would have been paid at the time had the defendants possessed the necessary funds for that purpose—these are so many deductions from the profits, which, in my opinion, are not ascertained till the whole of them are paid."[29] It has been held, on grounds that seem obvious, that undrawn profits carried to a suspense account or to a surplus fund or reserve fund, by whatever name called, may subsequently be distributed in dividends, provided the purpose to which they were dedicated has failed—which, of course, is to be decided by the directors.[30] The principle is that the capital which may

[22] Lexington, etc. Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165.

[23] Slayden v. Seip, 25 Mo. App. 439, 446.

[24] Lexington Ins. Co. v. Page, *supra;* Main v. Mills, 6 Biss. (U. S.) 98; Williams v. Boice, 38 N. J. Eq. 364; McCusick v. Seymour, etc. Co. (Mich.), 50 N. W. Rep. 116.

[25] People v. San Francisco Savings Union, 72 Cal. 99.

[26] *Supra*, § 1.

[27] *Re* Sharpe (1892), 1 Ch. 154.

[28] Lee v. Neufchatel Asphalte Co., 41 Ch. Div. 1, 6 Rail & Corp. L. J. 266.

[29] Corry v. Londonderry, etc. R. Co., 29 Beav. 272. For a definitions of net earnings, in the sense of surplus profits, see Union Pacific R. Co. v. United States, 99 U. S. 420; also note in 99 Am. Dec. 762.

[30] *Re* Bridgewater Nav. Co. (1891), 2 Ch. 327; affirming s. c. (1891), 1 Ch. 155.

not be lawfully divided among the shareholders consists of the primary capital, which is the stock on which the corporation has commenced business and which it holds itself out to the public as possessing. In the absence of statutory restraint, any increments of that capital may lawfully be divided. although such increments have acquired the name of capital. This has never been better stated than in the pointed language of Lord Bramwell, in a leading case in the House of Lords: "A trader, whether sole or corporate, trades with all the money he has got, let him have got it how he may. A sole trader with a capital of ten thousand pounds who makes in a year a profit of two thousand pounds, and spends one thousand pounds only, leaving the other one thousand pounds in his business, may well in the next year be said to have a capital of eleven thousand pounds; not so where there is a partnership, whether an ordinary partnership or an incorporated partnership. There the undivided profits of any period, a year, or a shorter or longer time, continue to be undivided profits, unless something in the articles of partnership or some agreement by all the partners, makes them capital. They do not become capital by effluxion of time, or by their being used in trade."[31] Other decisions, too numerous to be collected here, deal with this question in respect of the personal liability of directors under statutes for declaring and paying dividends out of the capital, or when the corporation is insolvent;[32] and it may be added that the legislature of one State has attempted to formulate, in a succession of propositions, the circumstances under which a dividend may properly be declared.[33]

§ 5. *Stock and Scrip Dividends.*—In the absence of a statute restraining such action, it is within the discretion of the directors of a corporation, or at least within the power of the corporation, to issue additional shares of stock to represent its surplus profits, and to divide such stock *pro rata* among its existing shareholders.[34] So, it has been held that a railroad company may issue to its stockholders, bonds in lieu of cash dividends, to represent earnings which have been used in construction, and that dividends may be thus declared at one time covering a period of four years, instead of declaring them year by year, they having been duly earned.[35]

§ 6. *Right to Dividends as between Successive Owners of Shares.*—The general rule, briefly stated, is that a dividend belongs to the one who is the owner of the shares at the time when the dividend is actually declared, irrespective of the time when it was earned, although it may be payable at a future date.[36] This results from principles already stated, that the shareholders have in general no right of action for dividend until they are declared, and that profits or surplus earnings remain the property of the corporation until they are segregated from its property and set apart as the property of the stockholders by the resolution declaring the dividend. Until that time the surplus earnings belong to the corporation, precisely as any other property belongs to it which it may own, and each share of stock represents a present interest in it, and that interest passes upon a transfer of the share.[37] In other words, the profits and surplus funds of the corporation, whensoever they may accrue, are, until separated from the capital by the declaration of a dividend, a part of the capital itself, the shareholder's interest in which will pass with his shares under the name of stock in a transfer or bequest.[37a] Another way of stating the princi-

[31] Bouch v. Sproule, 12 App. Cas., at page 405.

[32] An interesting discussion of what may be divided by directors as profits without incurring a personal liability under such a statute may be found in Excelsior Water, etc. Co. v. Pierce (Cal.), 27 Pac. Rep. 44.

[33] Ohio Act of April 11th, 1888; Laws Ohio 1888, page 182.

[34] Williams v. Western Union Tel. Co., 93 N. Y. 162, 9 Abb. N. C. 437; reversing 48 N. Y. Super. (16 J. & Sp.) 349; 61 How. Pr. 216. See also Howell v. Chicago etc. R. Co., 51 Barb. (N. Y.) 378; Jones v. Terre Haute, etc. R. Co., 57 N. Y. 196; Kenton Furnace, etc. Co. v. McAlpin, 5 Fed. Rep. 743; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Rand v. Hubbell, 115 Mass. 471; Brown v. Lehigh Coal, etc. Co., 49 Pa. St. 270; Commonwealth v. Pittsburgh, etc. R. Co., 74 *Id.* 83; Barton's Trust, L. R. 5 Eq. 239; Mills v. Northern R., etc. Co., L. R. 5 Ch. 621.

[35] Wood v. Lary, 47 Hun (N. Y.), 550.

[36] Brundage v. Brundage, 65 Barb. (N. Y.) 397; *Re* Foote, 22 Pick. (Mass.) 299; Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379; Phelps v. Farmers', etc. Bank, 26 Conn. 269; Hyatt v. Allen, 56 N. Y. 553; Jones v. Terre Haute, etc. R. Co., 29 Barb. (N. Y.) 353, 17 How. Pr. (N. Y.) 529; Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732; Hill v. Newichawanick Co., 48 How. Pr. (N. Y.) 427; Goodwin v. Hardy, 57 Me. 143; March v. Eastern R. Co., 43 N. H. 515. Compare Currie v. White, 37 How Pr. (N. Y.) 330, 384, 6 Abb. Pr. (N. S.) (N. Y.) 352. *Contra:* Burroughs v. North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611.

[37] Goodwin v. Hardy, 57 Me. 143.

[37a] Phelps v. Farmers and Mechanics' Bank, 26

ple is to say that the purchaser of a share of stock in a corporation takes the shares with all its incidents, one of which is the right to receive all future dividends declared in respect of such share.[38] In still other words, a shareholder has an interest in proportion to the amount of his stock in all the corporate property, and has a right to share in any surplus of profits arising from its use and employment in the business of the company; and this right does not depend upon the time when he became a stockholder, but attaches whenever he acquires the stock, and entitles him to all subsequent dividends.[39] On the other hand, when a dividend is declared, then, on principles already stated, it becomes the property of whomsoever was the owner of the share at that particular time; it is segregated from the capital of the company, and consequently is no longer represented by the share certificate; and hence the subsequent transfer of the share will not transfer the dividend, although undrawn, unless the contract otherwise provides.[40] And this is so without reference to the date when the dividend is made payable, for it is the declaration of the dividend that creates the segregation and establishes the debt from the corporation to the stockholder.[41] If, therefore, a dividend has been declared but is not payable, it does not pass with the transfer of the shares.[42] It has been held, on the one hand, that this principle is not varied by a mere custom of brokers,[43] but, on the other hand, that it yields to the rules of a stock exchange in respect of transactions among its own members.[44] As the leading object of requiring transfers of shares to be made on the books of the company is to protect the company in its relations with its shareholders, the company will be protected in paying a dividend to him who stood on its books as the owner of the shares at the time when it was declared,[45] at least unless it have actual notice of a previous transfer.[46]. But this does not seem entirely clear, when it is considered that the company might easily require the shareholder to produce his certificate before receiving the dividend, and that the shareholder might easily comply with the obligation in case he had not transferred his shares.

§ 7. *Right to Dividend as between Life Tenant and Remainder-man.*—This is an extensive and perplexing subject, and one involving a regrettable conflict of judicial opinion. The writer has recently discussed it in an article published elsewhere,[47] and can only allude to it here for the purpose of stating that there are two opposing theories—the one is commonly called the Pennsylvania rule and the other the Massachusetts rule. We must suppose that, by a will or other instrument an estate has been vested in an executor or other trustee, upon a trust to pay the income to a certain person for life and to hold the *corpus* or capital for certain persons in remainder. Where the trust is created by a will, the life tenant is generally the widow of the testator, and the remainder-men are generally his children. Suppose, moreover, that a portion of this estate is vested in corporate shares. So long as the directors declare and pay ordinary dividends from profits, there is no difficulty, because they clearly go to the life tenant; and as directors have no power to pay dividends except from profits (unless in liquidation), all cash dividends other than dividends in liquidation presumptively go to the life tenant. So far there is no difficulty. But suppose that, instead of dividing their surplus profits, the directors, in

Conn. 269; Jones v. Terre Haute, etc. R. Co., 57 N. Y. 196; Ryan v. Leavenworth, etc. R. Co., 21 Kan. 365; Jermain v. Lake Shore, etc. R. Co., 91 N. Y. 483; Marble v. Van Wert Bank, 3 Ohio Circ. Ct. 464. Compare Burroughs v. North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611.

[38] March v. Eastern R. Co., 43 N. H. 515.

[39] Jones v. Terre Haute, etc. R. Co., 57 N. Y. 196. See also Williams v. Western Union Tel. Co., 93 N. Y. 190; Jones v. Morrison, 31 Minn. 153; Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449; Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379; *Re* Barton's Trust, L. R. 5 Eq. 238.

[40] Hopper v. Sage, 112 N. Y. 530, 21 N. Y. St. Rep. 591; 20 N. E Rep. 350, 8 Am. St. Rep. 771.

[41] Wheeler v. Northwestern Sleigh Co., 39 Fed. Rep. 347. Compare Burroughs v. North Carolina R. Co., 67 N. C. 376, 12 Am. Rep. 611, which was decided in disregard of this principle. See also, Curry v. Woodward, 44 Ala. 305.

[42] Hopper v. Sage, *supra;* Jones v. Terre Haute, etc. R. Co., 29 Barb. (N. Y.) 353. See to the same principle De Gendre v. Kent, L. R. 4 Eq. 283; Spear v. Hart, 3 Robt. (N. Y.) 420.

[43] Spear v. Hart, *supra.*

[44] Hopper v. Sage, *supra.* Application of these principles to "option sales," Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732. The same rule has been applied in respect of interest-bearing stock,—City of Ohio v. Cleveland, etc. R. Co., 6 Ohio St. 489.

[45] Cook Stock. § 541.

[46] McSherry, J., in Gemmell v. Davis (Md.), 23 Atl. Rep. 1032; Savage, C. J., in Bank of Utica v. Smalley 2 Cow. (N. Y.) 770, 780.

[47] 26 Am. Law Review, 1.

the exercise of the discretion already stated, conclude to convert it into capital, so to speak—that is, to use it as capital in the operations of the company, and to issue scrip dividends or stock dividends to the stockholders to represent it. Under the Pennsylvania rule, upon a contest between the life tenant and remainder-men, the court will investigate the circumstances under which the dividend was declared, and if, in substance and fact, it appears to have been a dividend declared out of earnings or profits, it will go to the life tenant, although declared in the form of stock;[48] but if, in point of fact, it appears to have been declared out of the *corpus* of the property of the corporation, it must be held for the remainder-men, although declared in cash.[49] But under the Massachusetts rule, the question is decided by the form of the corporate action which has been taken, resulting in the doctrine that cash dividends, however large, are income, and go to the life tenant, and that stock dividends, however made, are capital and go to the remainder-man.[50] It is at once seen that the Pennsylvania rule is a rule of justice, but one which must be very difficult of application in many cases; and that the Massachusetts rule is a rule of judicial ease and convenience, but one which in many cases must, and in some notoriously has, led to gross injustice. In an age of overworked judges and of overcrowded courts, a rule of judicial ease will prevail over a rule of tedious and difficult justice; and we accordingly find a marked tendency toward the Massachusetts rule. In England, where the chancery courts unquestionably at an early day acted more nearly in accordance with the Pennsylvania conception, the House of Lords has now declared, in substance, in favor of the principle that the question is to be determined by the form of corporate action;[51] the Court of Appeals of New York seems to have adopted the same view, impliedly overruling previous decisions in that State;[52] and more recently the Supreme Court of the United States, in an opinion delivered by Mr. Justice Gray which is characterized by the learning and laborious researches which are his habit, has thrown the weight of its great authority in favor of the Massachusetts rule, so that we now have perhaps a greater array of judicial authority in favor of the Massachusetts rule than that opposed to it.[53]

SEYMOUR D. THOMPSON.

St. Louis, Mo.

[48] Earp's Appeal, 28 Pa. St. 368; Wiltbank's Appeal, 64 Pa. St. 256, 3 Am. Rep. 585; Biddle's Appeal, 99 Pa. St. 278; Vinton's Appeal, 99 Pa. St. 434, 44 Am. Rep. 116; Clarkson v. Clarkson, 18 Barb. (N. Y.) 646; Simpson v. Moore, 30 Barb. (N. Y.) 638; Woodruff's Estate, 1 Tuck. (N. Y. Surr.) 58; *Re* Pollock, 3 Redf. (N. Y. Surr.) 100; Van Doren v. Olden, 4 Green (N. J.), 117; Ashhurst v. Field, 11 Green (N. J.), 1; Van Blarcom v. Dager, 4 Stew. (N. J.) 783; Lord v. Brooks, 52 N. H. 72; Pierce v. Burroughs, 58 N H. 302.

[49] Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164.

[50] Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Daland v. Williams, 101 Mass. 503; Leland v. Hayden, 102 Mass. 550; Adams v. Adams, 139 Mass. 452. Compare Heard v. Eldredge, 109 Mass. 260, 12 Am. Rep. 681; Sohier v. Burr, 127 Mass. 225; Hooper v. Rossiter, 1 McClel. 527; Bartons' Trust, L. R. 5 Eq. 238; Balch v. Hallett, 10 Gray (Mass.), 403.

[51] Bouch v. Sproule, 12 App. Cas. 385.

[52] *Re* Kernochan, 104 N. Y. 618.

[53] Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. Rep. 1057; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Rand v. Hubbell, 115 Mass. 461, 15 Am. Rep. 121, 135; Atkins v. Albree, 12 Allen (Mass.), 359; Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Mass. 542; Gifford v. Thompson, 115 Mass. 478; Brinley v. Grou, 50 Conn. 66, 47 Am. Rep. 618; Greene v. Smith (R. I.), 19 Atl. Rep. 1081; Brown's Petition, 14 R. I. 37, 51 Am. Rep. 337; Richardson v. Richardson, 75 Me. 570, 574, 46 Am. Rep. 428; Barton's Trust, L. R. 5 Eq. 228, 243; Sproule v. Bouch, 29 Ch. Div. 635; Bouch v. Sproule, 12 App. Cas. 385. Compare *Re* Kernochan, 104 N. Y. 618.

TRIAL—DIRECTING VERDICT.

CATLETT V. ST. LOUIS, I. M. & S. RY. CO.

Supreme Court of Arkansas, March 18, 1893.

1. Const. art. 7, § 23, which declares that "judges shall not charge juries with regard to matters of fact, but shall declare the law," does not prohibit a judge from directing a verdict for the defendant where the undisputed evidence is so conclusive in favor of the defendant that a judgment for the plaintiff would be reversed on appeal.

2. It is not negligence for a railroad company to omit to keep a lookout to prevent boys from swinging on the ladders of its slowly moving freight trains.

COCKRILL, C. J.: A railway company is not bound to keep a lookout to prevent boys from swinging on the ladders of its moving freight trains; and its failure to do so is not negligence. Bishop v. Railway Co., 14 R. I. 314; Railway Co. v. Stumps, 69 Ill. 409; Railway Co. v. Ledbetter, 45 Ark. 246; Railway Co. v. Connell, 88 Pa. St. 520. If boys have stolen rides in that way at a given point, without remonstrance from the company's train men, that fact does not amount to an invitation to do so on another occasion. The boy who attempts it is a trespasser, and the company owes him no duty save not to injure him wantonly. Daniels v. Railway Co. (Mass.), 28 N. E. Rep. 283; Morrissey v. Railway Co., 126 Mass. 377;

Wright v. Railway Co., 142 Mass. 296, 7 N. E. Rep. 866; Rodgers v. Lees, 140 Pa. St. 475, 21 Atl. Rep. 399, and cases cited; Shelton v. Railway Co., 60 Mo. 412; Duff v. Railway Co., 91 Pa. St. 458; Railway Co. v. Smith, 46 Mich. 504, 9 N. W. Rep. 830. The appellant argues that a slowly moving train is "dangerous machinery," alluring to boys; and that it is therefore negligent of the company to fail to take precaution to keep them off such trains. That is the argument made to sustain a class of cases known as the "Turntable Cases," the leading one of which is Railway Co. v. Stout, 17 Wall. 657. The doctrine of those cases has been much criticised and doubted, and by some courts repudiated. See Daniels v. Railway Co. (Mass.), 28 N. E. Rep. 283; Patt. Ry. Acc. Law, § 196. Whatever its merits may be, it has never been extended to such length as to control a case like this. See Bishop v. Railway Co., 14 R. I. 314; Shelton v. Railway Co., 60 Mo. 412. The youth of the person injured will sometimes excuse him from concurring negligence, but no amount of youthful recklessness can supply the place of proof of negligence on the part of a defendant sought to be charged on account of negligence. Patt. Ry. Acc. Law, § 75. There was no proof of negligence on the part of the company. There was therefore nothing for the jury to consider. The court so informed the plaintiff when the evidence was all in, and gave him the opportunity to take a nonsuit, but he elected to stand upon the legal sufficiency of his proof, and the court directed a verdict for the defendant.

The constitution provides that "judges shall not charge juries with regard to matters of fact, but, shall declare the law." Article 7, § 23. This provision shears the judge of a part of his magisterial functions, but it confers no new power upon the jury. It was the jury's province before this provision was ordained to pass only upon questions of fact about which there was some real conflict in the testimony, or where more than one inference could reasonably be drawn from the evidence. The constitution has not altered their province. It commands the judge to permit them to arrive at their conclusion without any suggestion from him as to his opinion about the facts. As Judge Battle expressed it in Sharp v. State, 51 Ark. 155, 10 S. W. Rep. 228, "the manifest object of this prohibition was to give the parties to the trial the full benefit of the judgment of the jury on the facts, unbiased and unaffected by the opinion of judges." If there is no evidence to sustain an issue of facts, the judge only declares the law when he tells the jury so. "The legally sufficiency of proof, and the moral weight of legally sufficient proof, are very distinct in legal idea. The first lies within the province of the court, the last within the province of the jury." Wheeler v. Schroeder, 4 R. I. 383. It was said in the case of Railway Co. v. Henson, 39 Ark. 419, that this provision prohibited the judge from directing a verdict for either party, but the other decisions of the court show that the rule there announced is limited to cases where there is some evidence to sustain the issue. Before and after that case was decided, the court, through Chief Justice English, said the practice of directing a verdict was improper "except in cases where there is no evidence to sustain the cause of action or defense, and the court can say so as matter of law, it being the province of the jury to judge of the facts and of the court to declare the law." Overton v. Matthews, 35 Ark. 155; Railway Co v. Barker, 39 Ark. 499. In Jones v. State, 52 Ark. 347, 12 S. W. Rep. 704, it was said the trial judge should in no case indicate an opinion as to what the facts establish, but that the court must necessarily determine whether there is any evidence at all to establish a given fact in deciding whether a request for a charge based upon a case hypothetically stated should be given or not. In Cline v. State, 51 Ark. 140, 10 S. W. Rep. 225, it was ruled that the provision of the constitution did not prohibit the judge from telling the jury that a certain fact was proved when it was in effect admitted by the parties, or there was no evidence to contradict it, and nothing from which a different inference could be drawn. In Railway Co. v. Perry, 37 Ark. 193, Judge Eakin, for the court, said: "If there is any evidence whatever, however slight, pertinent to the issue, it should not be taken from the jury, even if the court is satisfied that it would grant a new trial if a verdict were found upon it;" and he said that was the effect of the former rulings of this court. But the same learned judge, in the case of Oliver v. State, 34 Ark. 639, explained that the scintilla doctrine has never prevailed in this State. We take it therefore that "any evidence, however slight," as used by him, does not mean a scintilla merely. In Richardson v. State, 47 Ark. 567, 2 S. W. Rep, 187, Judge Smith says: "It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence," and that injunction cannot be too often repeated; for, as he further explains, when the questions of facts reach us, we do not undertake to revise the discretion of the circuit judge in that respect, but inquire merely whether there is a failure of proof on a material point. That is the marked distinction between the duty resting upon the trial and the appellate courts. To ascertain whether there is a failure of proof, or whether the evidence is legally sufficient to warant a verdict, the test is as follows: After drawing all the inference most favorable to the verdict that the evidence will reasonably warrant, is it sufficient in law to sustain the verdict?

The terms "some evidence," "any evidence." "any evidence whatever," and "any evidence at all," as used in the opinions, all means evidence legally sufficient to warrant a verdict. The legal sufficiency or evidence in that sense is a question of law, and the court must decide it, it matters not when or how it arises. The test that is applied by this court in determining the legal sufficiency of the evidence to sustain a verdict

justified the trial court in reaching the conclusion that there was no proof of negligence. The conclusion follows, as matter of law, that no recovery could be had upon any view that could be taken of the facts which the evidence could be said to tend to establish. The question of negligence was therefore one of law for the court to decide. Railway Co. v. Cox, 145 U. S. 593, 12 S. C. Rep. 905; Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. Rep. 679. As the evidence is not legally sufficient to sustain a verdict for the plaintiff, the jury had no duty to perform and it was the judge's duty to tell them so, as he did. When the whole case appears to have been developed,—that is, the plaintiff has adduced evidence tending to prove all the facts obtainable to sustain his complaint,—and the undisputed evidence is so conclusive that this court would be compelled to reverse the judgment based upon a verdict in his favor, the court should withdraw the case from the jury, and direct a verdict for the defendant. That was the condition of this case. If it is probable in any case that the missing link can be supplied a nonsuit would be the proper practice. When a judgment is reversed in this court because of no evidence to sustain the verdict, and the cause appears to have been fully developed, it has grown to be the practice since the act of April 14, 1891, to dismiss the suit instead of remanding the cause for a new trial. It is the duty of the courts to prevent parties from being harassed by suit after it appears that the suit can be of no profit to the plaintiff.

Affirm.

NOTE—*Directing Verdict.*—It has always been and is to-day the peculiar province of the jury, in trials before them, to find all matters of fact, and of the court to decide all questions of law therein. Whether there be any evidence or not is a question for the court; whether it is sufficient evidence is a question for the jury. While this is a doctrine universally conceded its application in practice is in some cases exceedingly difficult. "All judicial administration exhausts itself in the the two-fold office (1), of finding the ultimate facts upon which the rights of the parties depend, and (2) in applying the law to these facts. Where the judge ascertains that there is evidence tending to show the ultimate facts advanced by the party sustaining the burden of proof, it is for the jury to say whether the evidence is sufficient for that purpose." 2 Thompson on Trials, § 2243.

There is therefore in every case a preliminary question which is one of law, viz: Whether there is any evidence on which the jury could properly find the verdict for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit, if *onus* is on plaintiff, or direct a verdict for the plaintiff if *onus* is on the defendant. The old doctrine of "scintilla" of evidence, that where there is any evidence, however slight, tending to support the issue, the case must go to the jury, has been denied in England, in the American federal courts and in the courts of many of the States. Commissioners v. Clark, 94 U. S. 278; Connor v. Giles, 76 Me. 134; Wittkousky v. Wasson, 71 N. C. 451; Simmons v. Railway, 110 Ill. 340; Metropolitan Railway Co. v. Jackson, 3 App. Cas. 207; Brooks v. Somerville, 106 Mass. 275; Morgan v. Durfree, 69 Mo. 469; Jackson v. Hardin, 83 *Ib.* 186. The better rule seems to be, that before evidence is left to the jury there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence but whether there is any evidence upon which a jury can properly proceed to find a verdict, for the party producing it upon whom the burden of proof is imposed. This rule which is recognized and followed in the principal case is adopted in most of the States. In Virginia it is said, that the court may direct a verdict, where sufficiency of facts if believed by the jury to be proved, do not constitute a valid defense to the action. Such instructions do not question the sufficiency of the evidence to prove the facts, but instruct the jury as to the sufficiency of the facts, if believed to be proved, to constitute a valid defense or to establish plaintiff's case. Davis v. Miller, 14 Gratt (Va.), 1-22; re-affirmed in Burke v. Lee, 76 Va. 386. A verdict which has no substantial evidence to support it ought to be set aside. If upon an examination of the whole evidence there is nothing to prove a cause of action against the defendant, the demurrer thereto should have been sustained. Lang v. Moon, 107 Mo. 337. See also, Morgan v. Durfee, 69 *Ib.* 476. Where evidence given at the trial, with all inferences that jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury but may direct a verdict for the defendant. Randall v. Railway, 109 U. S. 478. The question is not whether there is literally no evidence but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. Jewel v. Parr, 13 C. B. 916. In Maine, in an opinion of the court by Peters, C. J., it is said: "A jury cannot be permitted to find there is evidence of a fact where there is not any. A plaintiff cannot read his writ to the jury and claim a verdict without submitting any evidence. Nor can he do so where the evidence is too slight or trifling to be considered and acted upon by the jury. The evidence must have some legal weight." There is no practical or logical difference between no evidence and evidence without legal weight. "The old rule that a case must go to the jury if there is a scintilla of evidence has been almost everywhere exploded. There is no object in permitting a jury to find a verdict which a court would set aside as often as found. The better and improved rule is not to see whether there is any evidence, a scintilla, or crumb, dust off the scales, but whether there is any upon which a jury can, in any justifiable view, find for the party producing it, upon whom the burden of proof is imposed." 76 Me. 132-34. To the same end see, Simmons v. Ry., *supra;* Davis v. Davis, 7 H. & J. (Md.) 136; Tysen v. Rickard, 3 Harr. & J. (Md.) 109; Nolan v. Shickle, 3 Mo. App. 300; Brown v. Ry., 58 Me. 489; Wittkousky v. Wasson, 71 N. C. 451; Williams v. City of Grand Rapids, 59 Mich. 51; Luttenton v. Fritz, 83 *Id.* 145; and articles on directing verdicts published in 9 Cent. L. J. 102, 17 *Id.* 427, 24 *Id.* 386.

Cases of negligence are no exception to this rule. The rule laid down in Michigan in cases of this class is as follows: Where record discloses any evidence tending to show actionable negligence, on part of defendant, which caused injury, the court cannot direct a verdict and case should be submitted to the jury. And in determining whether such is the tendency of the evidence, the testimony given upon that subject on the part of plaintiff must be taken as true. Sheldon v. Ry., 59 Mich. 175, and cases cited. It seems

therefore to be generally conceded that courts have the right, and it is likewise their duty, to pass upon the preliminary question whether the evidence presented is sufficient in law to establish the ultimate facts upon which the rights of the parties depend. If the entire evidence presented, while not directly tending to prove the issue, is such that the jury can by legal and logical deductions from the evidence find the fact sought to be established, the question should be submitted to them.

CORRESPONDENCE.

To the Editor of the Central Law Journal.

SALE OF GOVERNMENT DESERT LAND ENTRY TO SATISFY A JUDGMENT.

The decision of Judge Edward Nugent of the Third District Court of Idaho in the case of Coble v. Harvey, may be of interest to your western readers.

Plaintiff obtained judgment against defendant in 1891, and execution was issued and returned unsatisfied. Defendant had in 1890 entered a piece of government land under the desert land laws. In December 1892, plaintiff instituted supplementary proceedings for the purpose of subjecting defendants desert entry to the satisfaction of plaintiffs judgment. Plaintiff contended that the rights acquired by defendant by virtue of his filing were assignable (Feb. 1892, Circular General Land Offices, pages 31 and 34); that being assignable, and having value (which fact was proven on the hearing) they were property and as such in the absence of any statute exempting them were subject to forced sale. Plaintiff asked that a receiver be appointed, that defendant be required to assign his entry to the receiver or to the purchaser at a sale to be made by the receiver.

Defendant contended that the land covered by the entry was government land; that a sale of his entry (*i. e.* the right which he acquired by virtue of his filing) was contrary to public policy and that it was not such property as could be subjected to forced sale in any proceeding.

The court adopted the view of plaintiff and ordered defendant to assign to a receiver for purposes of sale, and that plaintiff's judgment be satisfied from the proceeds of such sale. No reported case was found in which this question was directly considered. Are there any? H. S. HAYS.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE — Verdict. — In an action on an accident insurance policy which insures against death from external, violent, and accidental means, not suicidal, a general verdict for plaintiff, and special findings that the insured was killed by a bullet penetrating the heart, establishes the fact that death was caused by external violence within the policy.—WARNER V. UNITED STATES MUT. ACC. ASS'N, Utah, 32 Pac. Rep. 696.

2. ADMINISTRATION—Probate Proceedings—Collateral Attack. — The "probate and common pleas court" of Jackson county is none the less a probate court because it has common pleas business added to its probate business; and an administrator's sale of land in Jackson county, made while such court was in session for the transaction of probate business, is valid, under the statute requiring such sale to be made during the session of the circuit, probate, or county court.—MACEY V. STARK, Mo., 21 S. W. Rep. 1088.

3. ADVERSE POSSESSION — Married Woman.—Where land has been in the adverse possession of third persons for some time before its conveyance to a married woman, her coverture does not interrupt the running of the statute.—MEXIA V. LEWIS, Tex., 21 S. W. Rep. 1016.

4. APPEAL — Defective Record. — Where the record does not contain the findings of fact and conclusions of law of the trial court, the judgment will be affirmed if, by an application of the law to any state of facts which may be legitimately deduced from the evidence in the record, that decision can be sustained.—MCCOY V. MAYER, Tex., 21 S. W. Rep. 1015.

5. APPEAL—Writ of Error.—Under Laws 1892, ch. 14, art. 1011*a*, subd. 8, authorizing the supreme court to issue writs of error to the court of civil appeals when the judgment of that court "reversing a judgment practically settles the case," where the court of civil appeals reversed a judgment, and remanded the cause for the introduction of parol evidence to enable a construction of an instrument on which the rights of the parties depend, error does not lie.—GALLAGHER V. MCHUGH, Tex., 21 S. W. Rep. 1033.

6. APPEAL BOND — Sufficiency.—An appeal bond that is alone conditioned that appellants shall pay and satisfy such judgment as may be rendered against them is not sufficient. It must contain the additional condition, either in terms or substance, that the appellants shall prosecute their appeal. — RUSS V. THEIR CREDITORS, La., 12 South. Rep. 627.

7. APPEAL BOND — Supplemental Bond. — Once an appeal bond has been filed, the jurisdiction of the lower court ceases, and that of this court attaches, and the former is without jurisdiction or authority to permit a supplemental bond to be filed.—BARROW V. CLACK, La., 12 South. Rep. 631.

8. APPEARANCE—Effect.—Since all defensive pleadings are styled the "answer" by the Texas statute, a special plea to the jurisdiction, filed by a non-resident on the ground that no proper service had been made on it, is a sufficient appearance to confer jurisdiction on the court under Rev. St. art. 1242, which provides that the filing of an answer shall constitute an appearance of defendant so as to dispense with the necessity for the issuance or service of citation upon him.—N. K. FAIRBANKS & CO. V. BLUM, Tex., 21 S. W. Rep. 1009

9. ASSIGNMENT FOR BENEFIT OF CREDITORS. — An assignee for the benefit of creditors has no better or greater rights in property assigned than his assignor. The assignee is bound where the assignor would be bound.—LOCKETT v. ROBINSON, Fla., 12 South. Rep. 649.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where both maker and indorser of negotiable paper become insolvent, and make a voluntary assignment for the benefit of creditors, the holder may prove his debt in full against both debtors, and receive from each fund a full *pro rata* of his whole debt. — CITIZEN'S BANK v. KENDRICK, Tenn., 21 S. W. Rep. 1070.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where an assignee or trustee accepts the assignment or trust deed, and such deed contains, to his knowledge, on its face, one or more falsehoods on a material point, calculated to deceive and mislead creditors to their injury, he is treated as having notice of his grantor's fraudulent intent, because a falsehood said or done to the injury of the property rights of another is of the very essence of fraud.—DOUGLASS MERCHANDISE CO. v. LAIRD, W. Va., 17 S. E. Rep. 188.

12. ATTACHMENT—Fraudulent Debtor.—Where, from uncontroverted testimony, it appeared that the assignment of his property by defendant in attachment was fraudulent and void; that he shipped cotton out of the State when he did not have visible property to meet his obligations; and that later, at a time when he was hopelessly insolvent, he shipped in his own name out of the State a bale of cotton paid him by one of his debtors,—the trial court erred in refusing to charge peremptorily that the attachment was rightfully sued out.—WILKINSON, BANKS & CO. v. DOCKERY, Miss., 12 South. Rep. 585.

13. BILL OF EXCEPTIONS—Performance of Conditions. —When a party has been granted a right under specific conditions, and the conditions have been complied with, the party acquires a right of which the court cannot deprive him, either by a revocation of the order imposing the conditions or inquiring into matters affecting the merits of the order previous to its being granted. The opposing party, having accepted the conditions, is bound to abide by the results.—MILLER v. WAY, S. Dak., 54 N. W. Rep. 814.

14. BILL OF SALE — When a Mortgage. — Where the relationship of debtor and creditor, or borrower and lender of money, is admitted to exist between the parties, and that a bill of sale absolute on its face was executed by the debtor to the creditor in connection with the making of such loan, such bill of sale will be held to be a mortgage, if the preponderance of proof shows that it was executed and delivered by the debtor to the creditor for the purpose and with the intention of making such loan secure. — SHAD v. LIVINGSTON, Fla., 12 South. Rep. 646.

15. CARRIER — Negligence.—The fact that a passenger on a train takes off his coat and places it on an unoccupied seat is not such contributory negligence as will prevent his recovering for money therein contained, lost by the overturning of the coach into the water.—BONNER v. GRUMBACK, Tex., 21 S. W. Rep. 1010.

16. CARRIERS—PASSENGERS — Nonsuit— Carriers. —In an action against a railroad company for personal injuries, the complaint alleged that plaintiff boarded a train of defendant, and paid his fare, and, when the train reached his station, defendant's servants negligently and wantonly refused to stop the train, but obliged him to jump from the car while in rapid motion, by which he was injured. Plaintiff elected to proceed for actual damage, only, and offered some testimony thereof: Held that the court erred in ordering a nonsuit. — THOMAS v. CHARLOTTE, C. & A. R. CO., S. Car., 17 S. E. Rep. 226.

17. CHATTEL MORTGAGES.—An agreement in a lease that the personal property on the premises shall be at all times liable for the rent, and that the lessor may hold it therefor on violation of the lease by the lessee, does not constitute a chattel mortgage, since title to the property is not transferred, but creates an equitable lien, enforceable against the property in the hands of the lessee, or his voluntary assignees, purchasers, or incumbrancers with notice.—MARQUAM v. SENGFELDER, Oreg., 32 Pac. Rep. 676.

18. CONSTITUTIONAL LAW—Obligation of Contracts—Railroad Companies.—The right given by the New York statute to the purchasers of railroad property and franchises at a foreclosure sale to form a new corporation with all the rights, powers, and privileges of the old one, upon filing with the secretary of State a certificate in the form therein prescribed. Was not a contract right, but was a mere regulation of law, and the subsequent act, requiring as a condition precedent to obtain a charter, the payment of a sum equal to one eighth of 1 per cent. upon the proposed amount of capital stock of the new company, was not, as applied to purchasers at the foreclosure of the pre-existing mortgage, an act impairing the obligation of contracts, within the meaning of the federal constitution.—PEOPLE v. COOK, U. S. S. C., 13 S. C. Rep. 645.

19. CONSTITUTIONAL LAW—Titles of Laws.—Act April 4, 1891, entitled "An act to establish and maintain a uniform course of text-books to be used in all the public schools within this State," excludes from its operation cities and districts having more than 100,000 inhabitants: Held, that the act did not violate Const. art. 4, § 28, providing that "no bill shall contain more than one subject, which shall be clearly expressed in the title."—STATE v. BRONSON, Mo., 21 S. W. Rep. 1125.

20. CONTRACT—Accepting.—Defendant railway company by letter offered to carry for plaintiff a certain quantity of logs at a certain rate, plaintiff to chain the logs if necessary for safety. Plaintiff wrote, accepting the offered rate, but said nothing about chaining the logs: Held, that by accepting the rate without qualification plaintiff accepted all the conditions specified by defendant, and the two letters constituted a valid and binding contract.—LAWRENCE v. MILWAUKEE, L. S. & W. R. CO., Wis., 54 N. W. Rep. 797.

21. CONTRACT — Consideration.—Plaintiff made improvements on defendant's land, being induced to do so by defendant's representations that the land belonged to a railroad company, and that by improving it plaintiff might acquire title thereto from the company: Held, that these facts constituted a sufficient consideration for a subsequent promise by defendant to pay plaintiff for the improvements.—CHARVAT v. MEYERS, Wash., 32 Pac. Rep. 726.

22. CONTRACTS — Consideration.—Damage to goods while in transit, caused by the carrier's negligence is a sufficient consideration for the carrier's promise to replace the goods or pay their value to the consignee. When evidence offered by defendant is excluded on plaintiff's objection, the supreme court, on defendant's appeal, will assume the exclusion to have been proper, where the objection is not preserved by bill of exceptions.—NEW YORK & T. STEAMSHIP CO. v. ISLAND CITY BOATING & ATHLETIC ASS'N, Tex., 21 S. W. Rep. 1007.

23. CORPORATIONS—Laborers' Liens.—Section 7, ch. 64, Acts 1882, cannot be extended to enbrace persons who have no privity of contract with the company, but must be confined to those who have such contract, and who, by virtue thereof, do the work and perform the labor for which the lien is claimed.—RICHARDSON v. NORFOLK & W. R. CO., W. Va., 17 S. E. Rep. 195.

24. CORPORATIONS—Service of Process.—Under Rev. St. Ill. 1891, ch. 110, § 5, which provides that in suits against corporations, in the absence of the president, summons may be served on any agent, of the company found in the county, does not authorize service of summons against a foreign railroad company upon persons employed by such company for the sole purpose of soliciting business for the company without authority to sell tickets or make contracts for the company, even though such company supplies them with desk room in an office occupied in part by other

companies, upon the window of such office the company's name is painted. Woods, J., dissenting.—N. K. FAIRBANK & CO. v. CINCINNATI, N. O. & T. P. RY. CO., U. S. C. C. of App., 54 Fed. Rep. 420.

25. CORPORATIONS—Subscriptions.—Subscriptions to the capital stock of a corporation, made on conditions that cannot be performed by the corporation until after its organization, cannot be considered in determining whether the requisite one-half of the authorized capital stock has been subscribed to entitle the corporation to organize.—PORTLAND & F. R. CO. v. SPILLMAN, Oreg., 32 Pac. Rep. 688.

26. COVENANT—Construction—Evidence.—When the language of a written agreement on its face, is ambiguous, the courts will look at the surrounding circumstances existing when the contract was made at the situation of the parties and the subject-matter of the contract, and will even call in aid the acts done by the parties under it, affording a clue to the intention of the parties; but the court never resorts in such a case to the verbal declarations of the parties either before, at the time of, or after the execution of the contract, to aid in giving construction to its language.—SCRAGG v. HILL, W. Va., 17 S. E. Rep. 185.

27. COMMON LAW—Arson—Circumstantial Evidence.—Tracks, marks, or indications discovered at or near the scene of the crime, tending to connect the accused with them, and pointing to him as the guilty agent, may be shown in evidence to establish the charge against him. Among these indications, footprints found at or near the place where the crime was committed, along with the discovery of the crime, corresponding to the tracks of the accused, may be resorted to for the purpose of identifying him as the guilty party.—WHETSTON v. STATE, Fla., 12 South. Rep. 661.

28. CRIMINAL LAW—Homicide.—A charge that if the deceased was lawfully in possession of the house and premises when he was killed, and on which he was living at the time of the killing, he was as exempt from hostile intrusion or from forcible or unlawful ejectment as if the place was his by fee-simple title, and he has as good right to defend it from such intruder, even if that intruder claimed ownership of the property, as if the title was in him without dispute, does not assume that, if the deceased was lawfully in possession of the house and premises, the defendant was a hostile intruder, with intent to forcibly and unlawfully eject the deceased. On the contrary its propositions as to lawful possession and hostile and forcible intrusion and unlawful ejectment are hypothetical.—BROWN v. STATE, Fla., 12 South. Rep. 640.

29. CRIMINAL LAW—Instructions—Reasonable Doubt.—It is not error for a judge to refuse to instruct a jury that "every material allegation" of the indictment must be proved beyond a reasonable doubt, where he has stated all the material facts necessary to constitute the offense, and the clear effect of his charge is that all such facts must be proved beyond a reasonable doubt before there can be a conviction.—WOODRUFF v. STATE, Fla., 12 South. Rep. 643.

30. CRIMINAL LAW — Murder.—Defendant, engaged with deceased in a fight without deadly weapons, is not guilty of murder where two bystanders, without any preconcert or any connection with the original quarrel, each acting independently of the other, suddenly take part in the fight against deceased, and one of them, with deadly weapon, without the consent or knowledge of defendant, inflicts a fatal wound.—STATE v. HOWARD, N. Car., 17 S. E. Rep. 166.

31. CRIMINAL LAW — Practicing Medicine without Certificate.—Where an information under Act April 2, 1883 (Rev. St. 1889, ch. 110, art. 1), for practicing medicine without a certificate from the board of health, alleges that defendant is not within any of the excepted classes created by that act, the negative averment is taken as true, unless disproved by defendant, since the subject-matter of such averment lies peculiarly within his knowledge.—STATE v. HATHAWAY, Mo., 21 S. W. Rep. 1081.

32. CRIMINAL PRACTICE—Indictment—In an indictment charging the defendant in two counts with burglarly and larceny, growing out of the same transaction, a verdict of "Guilty as charged in the indictment" is a sufficient basis for a sentence for the burglary.—STATE v. CRENSHAW, La., 12 South. Rep. 628.

33. DEED—Cancelling.—N executed a deed of land to two of his sons, which was duly recorded. The deed recited that the grantor had bargained the land to the grantees some months before, and received the purchase price. N afterwards executed a will devising the land to his wife, and he occupied it till his death, which occurred many years after the date of the deed: Held, that in action by the devisees of N's wife against the devisees of the grantees to cancel the deed, evidence that the widow of one of the grantees never heard her husband claim any interest in the land under the deed, and that the other grantee had, as the executor of his mother's will, distributed the rents of the land in dispute among the legatees, is sufficient to justify a cancellation of the deed.—NEBLETT v. NEBLETT, Miss., 12 South. Rep. 598.

34. DEED—Failure to Deliver.—A case in which a deed was executed, and acknowledged, ready for delivery, but was not delivered by anything then said or done, but was laid away in decedent's drawer where he kept his papers, together with his will executed at the same time. After the grantor's death the supposed deed and will were found in his draw: Held, such paper writing is not his deed, never having been delivered.—LANG v. SMITH, W. Va., 17 S. E. Rep. 213.

35. DEED—Husband and Wife.—M A B, a married woman, not living separate and apart, but with her husband, undertook by deed dated April 20, 1878, to sell and convey a certain track of land, part of her real estate, to two of her sons, W J B and B F B, without her husband joining in such deed; Held, said pretended deed was wholly ineffectual to divest M A B, the grantor of her ownership of such land, and did not pass any interest therein, legal or equitable, to the said grantees.—AUSTIN v. BROWN, W. Va., 17 S. E. Rep. 207.

36. DEED — Mistake in Description.—A deed from plaintiff to H stated that it was the intention to convey to H all plaintiff's land except a homestead of 200 acres. Before the conveyance certain of the boundary lines were measured by both parties, but by mistake the calls in the deed included a large part of the land reserved as a homestead. Subsequently the conveyance was set aside as in fraud of creditors, and judgment entered giving the creditors possession of the land conveyed: Held, that the creditors did not obtain a valid title to the homestead land embraced in the deed, either as against plaintiff or his wife.—FREEMAN v. HAMBLIN, Tex., 21 S. W. Rep. 1019.

37. DEED—Reformation.—The facts that an instrument purporting to be a deed has the usual attesting clause, "Witness my hand and seal," was properly signed by the grantor in the presence of witnesses, one of whom made oath that he saw the grantor "sign, seal, and as his act and deed deliver, the written deed," is sufficient evidence that the seal was omitted by mistake to enable the court to reform the deed by supplying the seal.—SULLIVAN v. LATIMER, S. Car., 17 S. E. Rep. 221.

38. DEED—Reformation—Mistake.—Where an agreement for the sale of land is made between the vendor and a person who pays the entire consideration, and at the latter's request, the deed is made out to a third person, the grantee may have the deed reformed on proof of mutual mistake in the original agreement, although he took no part in making such agreement.—ELWOOD v. STEWART, Wash., 32 Pac. Rep. 735.

39. DEED—Reformation—Vendor's Equitable Lien.—A mistake of the scrivener in drawing a deed, whereby the reservation of vendor's equitable lien is

omitted, will be corrected by a court of equity, but not to the prejudice of a lienholder whose debt was contracted on the faith of the vendee's ownership of the property conveyed by a deed of record, in which such lien is not reserved. The general rule is that the sale of real estate should not be made until the lienholders have been convened as prescribed by section 7, ch 139, of the Code.—LOUGH v. MICHAEL, W. Va., 17 S. E. Rep. 181.

40. DIVORCE—Custody of Children—Habeas Corpus.—Pending a suit for divorce in a court having jurisdiction of the parties and the subject-matter, another court will not interfere by writ of *habeas corpus* with either party's possession of their children, notwithstanding Rev. St. § 5415, which provides that, in all proceedings on *habeas corpus* between husband and wife for the custody of their children, the court may award the custody to the complainant or other guardian, as shall be deemed best.—IN RE MORGAN, Mo., 21 S. W. Rep. 1122.

41. DOWER—Partnership Property.—Land purchased by a firm of attorneys for the purpose of selling the same again at a profit is to be treated as personalty, so far as may be necessary for the purpose of setting up the partnership affairs, and the right of dower is subject to the debts of the firm.—YOUNG v. THRASHER, Mo., 21 S. W. Rep. 1104.

42. EMINENT DOMAIN—Condemnation Proceedings—Jurisdiction.—Gen. St. 1865, ch. 66, § 5, which provides that, in proceedings to condemn land for railroad purposes, any number of owners, "residents of the same county or circuit," may be joined in one petition, must be read in connection with section 2, which authorizes the inclusion in the same petition, of residents, non-residents, and persons unknown; and hence section 5 will be restricted to permitting those whose interests lie within the county or circuit to be joined as parties defendant, and not as prohibiting the joinder in the petition of a non-resident with residents.—UNION DEPOT CO. v. FREDERICK, Mo., 21 S. W. Rep. 1118.

43. EMINENT DOMAIN—Damage.—The compensation to be made to the owner of land taken in condemnation proceedings is estimated by ascertaining the value of the entire tract, exclusive of any prospective benefits from the proposed improvement, and deducting from this, still excluding benefits, the value of the entire tract after the part to be condemned has been taken.—WEST VIRGINIA, P. & T. R. CO. v. GIBSON, Ky., 21 S. W. Rep. 1055.

44. EQUITY—Costs.—Hill's Code, § 544, providing that costs shall be allowed to the prevailing party in equity cases, unless the court otherwise directs, invests the trial court with a discretion in the taxation of costs, and its action will not be reviewed on appeal except for an abuse of such discretion.—LOVEJOY v. CHAPMAN, Oreg., 32 Pac. Rep. 687.

45. EQUITY—Partnership Interest.—The remedy of a partner who has sold his interest to a copartner, upon the understanding that the latter will assume and pay the firm debts, and who does not complain of fraud or other matters vitiating the sale, but seeks merely to enforce the same, is not to be found in equity, as would be the case if the partnership relation still existed, and an accounting were necessary; the remedy at law being adequate.—BROWN v. BURNUM, Ala., 12 South. Rep. 606.

46. EQUITY—Rescission of Sale.—A sale of a tract of land as a given number of acres, more or less, is a sale in gross, with which a court of equity, in the absence of fraud, will not interfere in case of an after-discovered excess, unless it clearly appear such excess is so great as to affect the terms of the contract, and warrant the conclusion that the sale would not have been made had the truth been known.—PRATT v. BOWMAN, W. Va., 17 S. E. Rep. 210.

47. ESTOPPEL—Jurisdiction.—Suit in attachment was commenced in a county other than that of defendant's residence, but where one summoned as garnishee resided. The jury found the attachment wrongfully sued out, and awarded defendant damages therefor, and at the return term of the writ the garnishee appeared, and established the fact that he was not indebted to defendant: Held, that plaintiffs, having personally appeared, and prosecuted the action to a conclusion, were estopped from denying jurisdiction of the court to render judgment against them on the ground that no property or indebtedness of defendant had been sequestered by the writ of attachment and garnishment.—MCLAURIN v. BAUM, Miss., 12 South. Rep. 594.

48. EVIDENCE—Admissions of Agents.—The statements, representations, or admissions of an agent, to be admissible in evidence to bind his principal, must have been made at the time of doing the act he is authorized to do, and must have been concerning the act he was doing, either while actually engaged in the transaction or so soon thereafter as to be in reality a party of the transaction and constitute a part of the *res gestæ*.—LA RUE v. ST. ANTHONY & D. ELEVATOR CO., S. Dak., 54 N. W. Rep. 806.

49. EXECUTION—Levy by Sheriff.—In order to authorize any officer who is required to levy an execution or warrant of distress on property to require an indemnifying bond it is necessary that a doubt should arise as to whether said property is liable to such levy, and, when the indemnifying bond so required has been given, the right of the officer to recover after a judgment has been obtained against him and his sureties in his official bond for making sale of the property does not depend upon the question as to whether said doubt was well founded or not.—EVANS v. GRAHAM, W. Va., 17 S. E. Rep. 200.

50. EXECUTION—Presumption of Satisfaction.—An execution issued on a judgment was indorsed "Levied April 14, 1861, on one negro, named Wyatt, the property of S and held up by order of T." The execution was returnable on the first Monday in May following its issuance: Held, that, as the stay law was passed April 30, 1861, and a succession of stay laws prevented the sale of the slave until he was emancipated, there was no presumption that the judgment was satisfied by the levy.—SAUNDERS v. PRUNTY, Va., 17 S. E. Rep. 281.

51. EXECUTION SALE.—Purchasers of land at an execution sale under a senior judgment are not prejudiced by delay in recording the sheriff's deed made after the registration of a junior judgment, where nothing occurs between the registration and the record of the deed to affect the rights of the parties in so far as they may depend on the registration laws.—BRACKENRIDGE v. COBB, Tex., 21 S. W. Rep. 1034.

52. EXECUTION—Stay.—In an action on a bond given to stay, pending appeal, execution on a justice's judgment for the return of personal property or its value, where the appeal has been dismissed by the superior court, the complaint need not allege that execution was issued and returned unsatisfied, or that notice of the dismissal of the appeal was given, or that demand was made before the action was brought, or that a delivery of the property could not be had, or that appellant had refused to obey an order of the superior court, unless recovery is sought on such order.—PIEPER v. PEERS, Cal., 32 Pac. Rep. 700.

53. FEDERAL COURTS—Appeal.—Circuit Court of Appeals.—When the last day of the six months within which an appeal may be taken, or writ of error sued out, to review in the circuit court of appeals a decree or judgment rendered below, falls on Sunday, the appeal cannot be taken, or writ sued out, on any subsequent day.—JOHNSON v. MEYERS, U. S. C. C. of App., 54 Fed. Rep. 417.

54. FEDERAL COURTS—Circuit Court of Appeals—Jurisdiction.—The circuit court of appeals has jurisdiction to determine the jurisdiction of the United States court in the Indian Territory on a writ of error which brings up the whole case, whether the record presents the single question of such jurisdiction, or that with

other questions.—CRABTREE v. MADDEN, U. S. C. C. of App., 54 Fed. Rep. 426.

55. FEDERAL COURTS—Practice— Enlarging Time to File Record.—Under rule 16 of the circuit court of appeals for the seventh circuit, providing that the judge who signed a citation on appeal, or any judge of the circuit court of appeals, may enlarge the time for filing the record, such an order made by a district judge who is not a member of the circuit court of appeals, and who did not sign the citation, is void.—WEST v. IRWIN, U. S. C. C. of App., 54 Fed. Rep. 419.

56. FEDERAL COURTS—Witness—Fees.—It is a settled rule of practice for the federal courts to allow witnesses their mileage and *per diem* fees where they attend and testify to the request of one of the parties, although no subpœna was issued.—PINSON v. ATCHISON, T. & S. F. R. CO., U. S. C. C. (Mo.), 54 Fed. Rep. 464.

57. FIXTURES—Mortgage.—A planing machine, which is bolted to the floor of a saw mill, so as to keep it from moving, and which has no connection with the motive power except by a belt over a pulley wheel, is not part of the realty as between one who has delivered it to the owner of the mill upon conditional sale and a mortgagee of the realty to secure a pre-existing debt.—CHERRY v. ARTHUR, Wash., 32 Pac. Rep. 744.

58. FRAUDULENT CONVEYANCES — Consideration.— A conveyance by an insolvent to a creditor of property worth nearly double the creditor's claim is fraudulent and void as to other creditors, where the transferee has knowledge of the insolvency, and of the fact that the transfer was intended to defraud other creditors.—STUART v. SMITH, Tex., 21 S. W. Rep. 1026.

59. FRAUDULENT CONVEYANCES — Knowledge of Grantee.—Where the uncontroverted facts in the case show that the debtor, for the purpose of escaping a pursuing creditor, conveys his real estate to a purchaser, even for value, who has knowledge of the creditor's pursuit, and is aiding the debtor to escape the same, such purchaser will be held to have participated in the fraudulent purpose of his grantor, and his conveyance will be avoided as to such creditor.—GILLESPIE v. ALLEN, W. Va., 17 S. E. Rep. 184.

60. GUARDIAN—Sale of Ward's Land.—Where a guardian's sale of the land of his ward is void because the guardian had no authority to make the sale, the heirs of such ward are not estopped from denying the validity of the sale from the fact that they shared as heirs of the ward, in the proceeds of a sale under partition proceedings of land conveyed to the ward by the purchaser at the guardian's sale as a part of the consideration of such sale. — MUSSON v. FALL BACK PLANTING & MERCHANTILE CO., Miss., 12 South. Rep. 589.

61. GUARDIAN AND WARD—Sale of Minor's Land.—A sale of land of a minor, situate in Mississippi, by a guardian appointed in Louisiana, acting under a decree of the court of Louisiana, is void, and vests no title in the purchaser. — MUSSON v. FALL BACK PLANTING & MERCHANTILE CO., Miss., 2 South. Rep. 587.

62. HIGHWAY — Title to Fee. — The construction of a private railroad for exclusive private use is entirely beyond the servitude imposed by law, and can no more be made on that portion of an owner's land occupied by a public road than on any other portion of his estate. — BRADLEY v. PHARR, La., 12 South. Rep. 618.

63. HOMESTEAD — Fraud.—A judgment debtor, who has conveyed property with intent to defraud creditors, or invested in property, the title to which was taken, with like intent, in a third person, has no claim of homestead thereon which he can assert against creditors.—KENNEDY v. FIRST NAT. BANK OF TUSCALOOSA, Ala., 12 South. Rep. 617.

64. HUSBAND AND WIFE.—A husband may sue alone to have declared a vendor's lien on land alleged to have formerly belonged to the husband and his wife, and to have been sold by them to defendants; Rev. St. art. 1204, providing that the husband may sue either alone or jointly with his wife for the recovery of any separate property of the wife.—MEYER v. SMITH, TEX., 21 S. W. Rep. 995.

65. INJUNCTION BOND—Damages—Attorneys' Fees.—In an action on an injunction bond to recover the attorney's fee paid by plaintiff (defendant in the injunction suit) for services therein, it appeared that no other relief was asked in such suit than the injunction, and that the temporary injunction was dissolved on the trial, and not on a separate motion. Plaintiff testified that she employed the attorney "to dissolve the temporary injunction, and to resist the perpetual injunction:" Held, that plaintiff need not show how much of the attorney's fee was paid "to dissolve the temporary injunction," and how much "to resist the permanent injunction," as the right to the injunction was the only cause of action. — CREEK v. MCMANUS, Mont., 32 Pac. Rep. 675.

66. INJUNCTION—Mortgagees.—An injunction will be granted to restrain an execution sale at the suit of a prior mortgagee, whose mortgage was wrongfully marked "satisfied" by a person without authority from him, and who took a subsequent mortgage on the faith of a contract with the mortgagors that the prior mortgage should remain in force until the entire debt was satisfied, since the rights of the mortgagee are not evidenced in whole by title of record, and the execution sale would place a cloud on his title.—IVORY v. KEMPNER, Tex., 21 S. W. Rep. 1006.

67. INSANITY—Discharge—Mandamus.—Where a lunatic, who has been confined in an asylum, is released temporarily for her improvement, and after such release completely recovers, *mandamus* will lie against the superintendent of the asylum to grant her a certificate of discharge, without her return to the asylum for examination. — STATHAM v. BLACKFORD, Va., 17 S. E. Rep. 233.

68. INSURANCE.—Where an insurance agent solicited insurance on property in an adjoining State, assuming to act with full authority of an unrestricted agency, and a person contracted for insurance with him, and paid him the premium, and the company received it, and issued a policy, the jury are warranted in finding that the agent was a general agent, and not a special agent without authority to make the contract.—HAHN v. GUARDIAN ASSUR. CO., Oreg., 32 Pac. Rep. 683.

69. INSURANCE — Verbal Contract. — The statute of frauds has no application to a verbal executory contract for the issuance of a policy of insurance, and such an agreement is binding without any written memorial.—HOWARD INS. CO. v. OWENS, Ky., 21 S. W. Rep. 1037.

70. INTOXICATING LIQUORS — Local Option. — Where the vote under the local option law was, in a certain district, against the sale of liquors, but while such law was in force the legislature amended the charter of a city within that district, authorizing the city council to thereafter grant licenses for retailing liquors in the city, the operation of the local option law, so far as concerned the city, was repealed. — TABOR v. LANDER, Ky., 21 S. W. Rep. 1056.

71. JUDGMENT FOR COSTS.—A judgment for costs is not allowed in favor of a clerk or other officer of a court or any witnesses attending, but their fees must be collected by fee bill, and they have no interest in the judgment for costs obtained by the prevailing party, and he may forgive the judgment or compromise it for a less sum, as he may desire.—HOOVER v. MISSOURI PAC. RY. CO., Mo., 21 S. W. Rep. 1076.

72. JUDICIAL SALE.—Where a commissioner, appointed by the court, sells personal property on credit, and the purchasers afterwards resell the property, and leave the State without paying their bid, the purchasers' vendees are not subject to an order to either pay the bid of their vendors or surrender the property to the commissioner, because they were not parties to the original suit; but, if the vendees had no title because the bidders had none, the commissioner's remedy was

by an action for a recovery of the property.—WEAVER V. NELSON, Miss., 12 South. Rep. 597.

73. LIMITATIONS — Beginning of Action. — Where a person against whose tenants ejectment has been commenced is made a defendant on her own application, the action must be considered as having been commenced against her at the time it was brought against the other defendants, in computing the time within which it was necessary for plaintiffs to bring their action to avoid the bar of the statute of limitations.—TURNER V. WHITE, Ala., 12 South. Rep. 601.

74. LIMITATIONS—Municipal Corporations—Infancy.—Acts 22d Gen. Assem. Iowa, ch. 25, § 1, barring any suit against a municipal corporation for personal injuries caused by defective streets after six months from the date of the injuries, unless, within 90 days from such date, plaintiff gives written notice, specifying place and circumstances of the injury, is binding upon an infant as well as an adult.—MORGAN V. CITY OF DES MOINES, U. S. C. C. Iowa, 54 Fed. Rep. 456.

75. MARRIAGE.—The facts being established—First, that at the date of the marriage between plaintiff and defendant the latter was already lawfully married to another; and, second, that plaintiff was fully cognizant of that fact,—the legal conclusions follow: First, that plaintiff is entitled to the decree prayed for by her in this suit, declaring the nullity of the marriage; and, second, that the marriage produced no civil effects, either as to the parties or their offspring.—MOUNIER V. COUTEJEAN, La., 12 South. Rep. 623.

76. MASTER AND SERVANT — Fellow-servant. — The foreman of a railroad switching crew is not a fellow-servant with one of the "helpers," who is subject to his orders, and the railroad company is liable for injuries received by the "helper" through the negligence of the foreman.—ARMSTRONG V. OREGON SHORT LINE & U. N. RY. CO., Utah, 32 Pac. Rep. 593.

77. MASTER AND SERVANT — Negligence. — Where the section crew of a railroad company side track a hand car with which they are working to clear the main track for an approaching train, and the section foreman, who has unlocked the switch, negligently fails to close it, and the train enters on the side track, and kills a section hand, the section foreman is personally liable in damages for his death.—DAVES V. SOUTHERN PAC. CO., Cal., 32 Pac. Rep. 708.

78. MECHANIC'S LIEN — Subcontractor. — By section 5470, Comp. Laws, a subcontractor is entitled to a lien, as defined in the preceding section, for labor done or material furnished, if, within 60 days after the doing of the labor or the furnishing of the material, he file with the clerk of the circuit court of the proper county or subdivision the account of the demand due him as therein provided.—ALBRIGHT V. SMITH, S. Dak., 54 N. W. Rep. 816.

79. MINES AND MINING — Width of Claim — Patent.—Under Rev. St. § 2320, a patent cannot be issued for a mining claim exceeding 300 feet in width, although the orignal location was wider, and was made under the law of July 26, 1866, by which the width of claims was regulated according to the custom of minors; and, where a patent is issued for the full width of such claim, it is void as to the excess, and Rev. St. § 2328, cannot be construed to preserve a right to the issuance of a patent covering the full width of the original location.—LAKIN V. ROBERTS, U. S. C. C. of App., 54 Fed. Rep. 461.

80. MORTGAGE — Foreclosure. — Where the holder of two purchase-money notes secured by a vendor's lien retained in a deed for land forecloses on one note, alleging the execution of the other, but asking no relief in regard to it, purchasers at the foreclosure sale take the land discharged of the lien of the note not foreclosed on.—VIENO V. GIBSON, Tex., 21 S. W. Rep. 1028.

81. MUNICIPAL CORPORATIONS—Improvements.—Rev. St. 1879, § 4781, gives power to cities of the second class to grade and improve their streets at such time and to such extent "as shall be provided by ordinance," and Laws 1885, p. 59, provides that no street in any city of the second class shall be graded or regraded, unless the property owners petition therefor, or the council provide for the assessment of damages: Held, that an ordinance for grading and macadamizing a previously graded street, where no change in the grade was actually made, need not provide for compensation, since the act of 1885 supplemented instead of repealed the former statute.—GIBSON V. OWENS, Mo., 21 S. W. Rep. 1107.

82. MUNICIPAL CORPORATIONS—Street-paving Contract.—A requirement in a street-paving contract that a contractor shall keep the street in repair for five years imposes an additional burden on the property owners, and therefore vitiates the assessmeut made under it, unless such requirement is authorized by the statute providing for the letting of contracts for street improvements.—BROWN V. JENKS, Cal., 32 Pac. Rep. 701.

83. MUNICIPAL INDEBTEDNESS—Constitutional Limitations.—Improvement bonds of a city declared that it "acknowledges itself indebted to and promises to pay the bearer thereof the sum of——dollars, lawful money of the United States," and that they were payable out of the proceeds of the improvement assessments chargeable on the property benefited, and that they were issued on the faith and security of such assessments: Held, that the city was bound absolutely for the payment of the bonds, though it might be reimbursed from the payment of the improvement assessments, and that they constituted municipal indebtedness, within the meaning of Const. art. 11, § 3, prohibiting a municipality from incurring an indebtedness exceeding 5 per cent. of the value of the taxable property therein.—FOWLER V. CITY OF SUPERIOR, Wis., 54 N. W. Rep. 800.

84. NATIONAL BANKS—Usury.—Under Rev. St. U. S. § 5198, relating to national banks, providing that the taking a rate of interest greater than is allowed by the preceeding section, when knowingly done, shall be deemed a forfeiture of the entire interest, where a national bank loaned money at usurious interests, and added it into a note, which was several times renewed at the usurious rate, the bank is only entitled to recover, in an action on the last note, the principal sum originally loaned, less the partial payments made on the notes.—SNYDER V. MT. STERLING NAT. BANK, Ky., 21 S. W. Rep. 1050.

85. NEGLIGENCE— Contributory Negligence.—Where decedent was killed by the willful negligence or recklessness of defendant railway's employees, the fact that he was guilty of contributory negligence is no bar to recovery.—MCDONALD V. INTERNATIONAL & G. N. R. CO., Tex., 21 S. W. Rep. 774.

86. NEGLIGENCE—Evidence.—In an action by a brakeman against a railroad company for personal injuries alleged to have been caused by the negligence to the engineer in "jamming the cars too hard," the admission of testimony to show that if other brakemen had been in their places, and had set the brakes on the cars, the accident would not have happened, is error, as it introduces an issue of negligence not raised by the pleadings.—ALABAMA G. S. R. CO. V. RICHIE, Ala., 12 South. Rep. 612.

87. NEGLIGENCE—Instructions.— Where a telephone company is sued for damages caused by the falling of a wire, the omission in an instruction purporting to state the facts that must be found to entitle the plaintiff to recover, of the qualification that, in order to make a *prima facie* case of negligence, the falling of the wire must be unexplained by evidence showing that it was unavoidable, is harmless error where there has been no attempt to show that the falling of the wire was unavoidable, since the burden of proving that fact is on the defendant.—ARKANSAS TEL. CO. V. RATTEREE, Ark., 21 S. W. Rep. 1059.

88. NEGOTIABLE INSTRUMENT—Pleading.—To a complaint in the usual form upon a promissory note, defendant pleaded a general denial, and that the cause of action alleged in the complaint did not accrue

within six years. At the trial, the court, upon motion of plaintiff, compelled the defendant to elect upon which defense he would go to trial: Held, error.—LAWRENCE V. PECK, S. Dak., 54 N. W. Rep. 808.

89. NEGOTIABLE INSTRUMENT — Accommodation Indorser.—Where defendant's name was indorsed on the back of a note, under that of the payee at the request of the payee, to enable him to discount the note, he was, as to the payee, merely an accommodation indorser, and his liability to a subsequent holder was that of a second indorser; and where his name appeared on the back of the note, after that of the payee, when it was presented to plaintiff for discount, plaintiff was apprised that his liability was limited, and assumed the obligation to make demand and give notice of dishonor, and, having failed to do so, he cannot look to him for payment.—PERRY V. FRIEND, Ark., 21 S. W. Rep. 1065.

90. NEGOTIABLE INSTRUMENTS— Costs of Protest.—In an action on a note for the costs of protest and notice, a plea that protest was waived on the day of maturity, and before protest by the notary, is demurrable, since the term "process," in its popular significance, means "those acts which are necessary to charge an indorser," and with this significance the plea is open to the construction that the alleged waiver was subsequent in point of time to the dishonor of the note.—WHITE V. KEITH, Ala., 12 South. Rep. 611.

91. NEW TRIAL — Newly-discovered Evidence. — In such action, where the replication alleges that plaintiff would not have signed the receipt but for his ignorance of the English language, defendant is not entitled to a new trial because of newly-discovered evidence, where his affidavit therefor avers that he was surprised by plaintiff's testimony of his ignorance of English, and could not at that time introduce any evidence except the witnesses who testified, as it is impeaching testimony.—FIST V. FIST, Colo., 32 Pac. Rep. 719.

92. PARTNERSHIP.— Where a contract provides that one of the parties shall contribute the use of a theater building, and is to pay certain expenses incident to the use thereof, and the other party shall contribute his time and skill in the management and conduct of the business, and is to pay a fixed sum per month for lighting and heating the building, a fixed sum for rent, and the "lessor" is to receive "as additional rent one-half of the net annual profits accruing from the business of the theater," and each party is to pay one-half of the losses of the business, this contract constitutes them partners, notwithstanding that it uses the terms "lessor" and "lessee."—LEAVITT V. WINDSOR LAND & INVESTMENT CO., U. S. C. C. of App., 54 Fed. Rep. 439.

93. PARTY-WALL AGREEMENT. — The provision in a party-wall agreement that the rights of the parties shall continue "so long as the wall shall stand" does not mean so long as any portion of the wall itself shall remain, but so long as the wall shall remain fit for use as a party-wall, and therefore it does not violate a provision in the agreement that "no perpetual right or easement shall be thereby acquired."—ODD FELLOWS' HALL ASS'N V. HEGELE, Oreg., 32 Pac. Rep. 976.

94. PLEADING—Jurisdiction—Waiver.—The objection that the court has not jurisdiction of the action is not waived by a failure to demur to the complaint, upon that ground, in the court below, and may be taken at any time, either in the trial court, or in this court on appeal.—NELSON V. LADD, S. Dak., 54 N. W, Rep. 809.

95. PLEADING—Name—Variance. — If there be a variance, as to the middle name of the payee of a note, between the description of the note in the declaration and the note itself, and such variance would even be deemed material, and it is not taken advantage of in some way before judgment, it will not be ground for reversal of the judgment, being cured by section 3, ch. 134, of the Code. This is so, though the judgment was rendered upon defendant's demurrer to the plaintiff's evidence.—LONG V. CAMPBELL, W. Va., 17 S. E. Rep. 197.

96. PLEADING — Parties. — In an action by judgmen creditors for the appointment of a receiver to take charge of a steam mill, alleged to be the property of their debtor, the payees of unpaid purchase-money notes given for the mill are necessary parties. — WHEELER V. BIGGS, Miss., 12 South. Rep. 596.

97. PRINCIPAL AND AGENT — Authority of Agent.—An agent has such authority as the principal actually or ostensibly confers upon him; and when one holds another out to the world and accredits him as his agent, in determining the liability of the principal the question is not what authority was intended to be given to the agent, but what authority were third persons dealing with him justified from the acts of the principal in believing was given to him.—ALDRICH V. WILMARTH, S. Dak., 54 N. W. Rep. 811.

98. PUBLIC LANDS — Homestead Entry. — A person entering a homestead under the laws of the United States acquires a vested right therein at the expiration of five years from entry, but no estate in the lands vests in him until he has complied with the required conditions.—LOVELL V. WALL, Fla., 12 South. Rep. 659.

99. PUBLIC LANDS—Titles Derived from States.—The State of California is not a necessary party to a bill by the United States to recover the possession of certain public lands listed by mistake to that State under 19 St. at Large, p. 267, and by it sold to respondent.—UNITED STATES V. HENDY, U. S. C. C. (Cal.), 54 Fed. Rep. 447.

100. QUIETING TITLE—Jurisdiction—Land in another State.—A suit to remove an alleged cloud from the title to land may be brought in another State, since the decree compelling the defendant to release the cloud operates only *in personam*.— REMER V. MCKAY, U. S. C. C. (Ill.), 54 Fed. Rep. 432.

101. QUIETING TITLE—Laches.—A suit to remove a cloud from title by correcting a mistake in description in a series of deeds is not barred as a State demand by the fact that the first of such deeds was recorded 30 years before suit, where all persons claiming under such deeds admitted the mistake, and laid no claim to the land covered by the mistaken description until within a year bringing the suit.—RIGGS V. POLK, Tex., 21 S. W. Rep. 1013.

102. QUIETING TITLE—Sufficiency of Complaint.—In a suit to remove a cloud from plaintiff's title, an allegation that defendant claims an adverse estate or interest in the land is sufficient without showing the nature of such claim or its invalidity.—AMTER V. CONLON, Colo., 32 Pac. Rep. 721.

103. REMOVAL OF CAUSES—Citizenship.—The removal act of 1887, as amended in 1888, provides that where, in a suit in a State court, there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, "any defendant, being such citizen of another State, may remove such suit, into the Circuit Court of the United States," on proper showing: Held that, where neither plaintiff nor defendant are citizens of the State in which the action is brought, the circuit court has no jurisdiction, and, where such court makes an order that the cause be certified thereto, the State court may decline to permit the removal.—LAWSON V. RICHMOND & D. R. CO., N. Car., 17 S. E. Rep. 169.

104. REPLEVIN—Husband and Wife.—In replevin by a married woman, where the complaint alleges that she is owner of the property, she need not show in her pleadings that she acquired her title through one of the channels, by which a married woman is allowed to acquire separate property. Where a complaint in replevin demands the return of property worth $200, and damages for its detention, amounting to $500, the supreme court has jurisdiction of the case on appeal, since the amount in controversy is $700.—FREEBURGER V. CALDWELL, Wash., 32 Pac. Rep. 732.

105. SALE — When Title Passes.—The purchaser of goods under a contract providing for the payment of a part of the purchase price at 10 days from date of shipment, and the giving of a note at four months for

the balance, acquire title at the date of shipment, though they never intended to comply with the contract, and a sale by such purchasers of the goods so obtained in the usual course of their business, and before any steps were taken by their vendors to disaffirm the contract of sale to them, vests an indefeasible title in their vendees, if they are innocent purchasers for value.—FIRST NAT. BANK v. COOK CARRIAGE CO., Miss., 12 South. Rep. 598.

106. SCHOOLS — Contract — Damages.—In an action against a school district for unlawful discharge, it appeared that plaintiff had been employed for one year beginning July 1, 1888, at a salary of $1,800, and that he was discharged November 7, 1888, without cause, whereupon he went to work on a farm belonging to him. The jury found specially that by his change of abode after his discharge he saved $350, in living expenses: Held, that defendant was not entitled to have such saving applied in reduction of damages.—GATES v. SCHOOL DIST. OF FT. SMITH, Ark., 21 S. W. Rep. 1060.

107. SLANDER OF WIFE—Suit by Husband.—An action for slandering a wife by charging her with incontinence cannot be maintained by the husband alone, unless he avers special damages.—HARPER v. PINKSTON, N. Car., 17 S. E. Rep. 161.

108. SPECIFIC PERFORMANCE — Homestead Entry.—A written contract by homesteader, made before he has complied with the United States homestead law in reference to acquiring a title from the United States, to convey his homestead, is against public policy, and void, and will not be enforced in a court of equity, although a valuable consideration may have passed to the homesteader from the purchaser.—MCCRILLIS v. COPP, Fla., 12 South. Rep. 643.

109. TAXATION — Bank Deposits.—Moneys placed in the Manhattan Bank by the State treasurer of New York, pursuant to the contract of July 13, 1840, between the bank and the commissioners of the canal fund, and also under the provisions of Rev. St. N. Y. pt. 1, ch. 8 tit. 4, §§ 7 10, to be disbursed by the bank, as agent of the State, in discharge of the principal and interest of the State canal loan and the loan for payment of bounties to volunteers, and which moneys were held by the bank at its own risk, mixed with its general funds, and were subject to be recalled by the State, were true "deposit," and computable as such in determining the sum which was subject to the federal tax of one twenty-fourth of 1 per cent. a month, imposed by the act of June 30, 1864, § 110, on the average amount of bank deposit subject to payment by check, draft, etc.—PRESIDENT & DIRECTORS OF MANHATTAN CO. v. BLAKE, U. S. S. C. 13 S. C. Rep. 640.

110. TAX DEED.—In an action to set aside a tax deed, where defendant has paid the taxes, it is error to adjudge the property to plaintiff without decreeing the payment of the taxes advanced and the statutory interest as such payment of taxes is an equitable lien on the property.—MITCHELL v. ARKELL, Colo., 32 Pac. Rep. 720.

111. TAX DEED—Limitations — Color of Title.—A void tax deed is color of title sufficient to sustain the bar of the statute of limitations provided for actions relating to tax deeds.—WARD v. HUGGINS, Wash., 32 Pac. Rep. 740.

112. TRIAL—Oral Instructions.—Under Comp. Laws 1888, § 5033, providing that if the charge of the court to the jury is not given in writing it must be taken down by the phonographic reporter, an objection that an oral charge was not taken down by the reporter, being to a mere formal requirement of the statute, was waived where the complaining party and his counsel were present when the charge was delivered, and failed to call the attention of the court to the omission till after verdict.—UNITED STATES v. GOUGH, Utah, 32 Pac. Rep. 695.

113. TRIAL—View of Premises by Jury.—Under Civil Code, § 318, which empowers the court to order the jury to take a view of the premises where any material fact occurred, the court may order such view, at the request of the jury, after they have retired to their room to consider their verdict, since section 321 permits the jury to return into court on a disagreement between them as to any part of the testimony, and be satisfied as to it.—LOUISVILLE, N. A. & C. RY. CO. v. SCHICK, Ky., 21 S. W. Rep. 1036.

114. TRUST DEED—Estoppel.—Where land is granted in trust for the payment of the grantor's debts, the fact that beneficiaries under the trust stand by and allow a railroad company to take possession of and construct a railroad on a right of way over the land does not estop them to assert their right under the trust, where the company had knowledge of its existence.—MARY LEE COAL & RY. CO. v. WINN, Ala., 12 South. Rep. 607.

115. VENDOR'S LIEN — Evidence. — A sheriff's deed conveyed land to two persons, and one of them subsequently sold his one-half interest to his cotenant, taking the latter's note in payment: Held, in an action by an indorser of the note to foreclose a vendor's lien on the entire tract, that the sheriff's deed was admissible to show that the lien extended only to one-half of the tract, without proof of the judgment and execution, since such deed is a part of the chain of title common to both parties. — MASTERSON v. MCKELVEY, Tex., 21 S. W. Rep. 1005.

116. VENDOR AND VENDEE — Exchange of Lands by Agent.—When an agent is authorized to sell and dispose of certain lands, and he exchanges them for other lands, the principal ratifies the act if he sell the lands which his agent received in exchange.—CHAMBERS v. HANEY, La., 12 South. Rep. 621.

117. WATER COURSES—Diversion.—North of plaintiff's land there are springs which, by a well-defined stream, discharge their waters into a natural lake about 60 acres in extent. From the lake the waters flow upon and beneath the lands southeast of the lake, to and across the land of plaintiff; thence easterly, until they are collected in a creek a few miles from the lake. The natural flow of the water from the lake is well defined, and in places, one of which is on plaintiff's land, it has made for itself a plainly-marked channel: Held, that though the water spreads over wide reaches of marsh and swamp lands, and percolates the soil in many places between the lake and the creek, it is still a water course, and an owner above cannot divert it as mere surface water.—CASE v. HOFFMAN, Wis., 54 N. W. Rep. 792.

118. WATERS — Accretion on Navigable Lakes.—The owner of land which is described in a patent from the government as bounded on the meander line of any inland lake, though navigable, except the Great Lakes, is entitled to the accretion lying between the meander line and the edge of the waters.—POYNTER v. CHIPMAN, Utah, 32 Pac. Rep. 690.

119. WATERS — Irrigation — Ditch Companies.—In an action by a ditch company, brought 25 years after its incorporation, for itself and its stockholders in, and the users and consumers of water from, a certain irrigating canal, against another ditch company and certain public officers, to enjoin defendants from appropriating the water of a certain stream, and for damages, on the ground that plaintiff had made a prior legal appropriation of the same, the complaint did not state the number or names of, or the quantity of land owned by, such stockholders and users of water, nor show, except by general averment, the necessity for the quantity of water claimed to have been acquired by prior appropriations: Held, that the complaint was insufficient. — FARMERS' INDEPENDENT DITCH CO. v. AGRICULTURAL DITCH CO., Colo., 32 Pac. Rep. 722.

120. WILLS — Description of Property. — In a will, a general description of the devised property as "the tract of land on which I now live" will prevail over a particular description by course and distance in case of a conflict between the two.—THOMSON v. THOMSON, Mo., 21 S. W. Rep. 1085.

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